Supreme Court, U.S.
FILED
MAR 31 1992
OFFICE OF THE CLERK

91-1583

No. _____

In The

Supreme Court of the United States

October Term, 1991

DR. NOLAN L. KINSEY,

Petitioner,

v.

SALADO INDEPENDENT SCHOOL DISTRICT,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLES M. McDONALD
Attorney of Record for Petitioner

Please Serve:

CHARLES M. McDONALD
McDONALD & MALONE
P. O. Box 1672
Waco, Texas 76703-1672
(817) 754-7317

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the balancing test used by the Court of Appeals to judge a former public employee's claim that his firing violated the First Amendment is so heavily weighted in favor of the public employer that the employee can never claim First Amendment protections?

2. Whether the Court of Appeals, in holding as a matter of law that a public employee was in a confidential or policymaking position, has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter holding that the issue is one of fact?

3. Whether the Court of Appeals erred in applying a balancing test to determine the disruptive effect of a public employee's assertion of speech and association rights when the public employer denies that the assertion of those rights played any part in its decision to discharge the public employee?

LIST OF PARTIES

The names of all parties to the proceeding in the Court of Appeals appear in the caption of the case.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS 1

GROUNDS FOR INVOKING THE JURISDICTION OF THIS COURT 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT 6

CONCLUSION 17

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

BRANTI V. FINKLE, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980) 7

CONNICK V. MYERS, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) 7, 8

COPP V. UNIFIED SCHOOL DISTRICT NO. 501, 882 F.2d 1547 (10th Cir. 1989) 16

ELROD V. BURNS, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) 7

McCOLLUM V. STAHL, 579 F.2d 869 (4th Cir. 1978), cert. den. 440 U.S. 912, 99 S.Ct. 1225, 59 L.Ed.2d 460 (1979) 9

McGURRIN ERHARD V. CONNOLLY, 867 F.2d 92 (1st Cir. 1989) 10

NEKOLNY V. PAINTER, 653 F.2d 1164 (7th Cir. 1981), cert. den. 455 U.S. 1021, 102 S.Ct. 1719, ___ L.Ed.2d ___ (1981) 9

PICKERING V. BOARD OF EDUCATION, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) 7

RANKIN V. UNIFIED SCHOOL DISTRICT NO. I-3, 876 F.2d 838 (10th Cir. 1989) 16

RUTAN V. REPUBLICAN PARTY OF ILLINOIS, 97 U.S. ___, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990) 7

SAYE V. ST. VRAIN VALLEY SCHOOL DISTRICT, RE-1J, 785 F.2d 862 (10th Cir. 1986) 16

SODERBECK V. BURNETT COUNTY, WIS., 752 F.2d 285 (7th Cir. 1985), cert. den. 471 U.S. 1117, 105 S.Ct. 2360, ___ L.Ed.2d ___ (1985) 9

WARE V. UNIFIED SCHOOL DISTRICT NO. 492, 881 F.2d 906 (10th Cir. 1989) 16

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS:

U.S. Constitution

Amendment 1 ..... 2, 5, 6, 7, 8

Amendment 14 ..... 2, 5

STATUTES AND RULES:

United States Code

Title 28, § 1254.(1) 2

Title 28, §§ 1331, 1343 5

Title 42, § 1983 ..... 3, 5

United States Supreme Court Rules

Rule 10.1.(a) 10, 17

Rule 10.1.(c) 8

No. _____

In The

Supreme Court of the United States

October Term, 1991

DR. NOLAN L. KINSEY,

Petitioner,

v.

SALADO INDEPENDENT SCHOOL DISTRICT,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Dr. Nolan L. Kinsey, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 3, 1992.

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The judgment of the District Court is reproduced in the Appendix. The panel opinion by the Court of Appeals was originally published at 916 F.2d 273 (5th Cir. 1990).

The Court of Appeals *en banc* vacated the panel opinion, which is reproduced in the Appendix. The opinion of the *en banc* Court of Appeals is reported at 950 F.2d 988.

GROUNDS FOR INVOKING THE JURISDICTION OF THIS COURT

(i) The opinion of the Court of Appeals is dated January 3, 1992.

(ii) No rehearing of the *en banc* decision was sought, nor was an extension of time in which to file this petition for writ of certiorari sought.

(iii) There is no reliance on Rule 12.3, Rules of the Supreme Court of the United States.

(iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is Title 28, United States Code, Section 1254.(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States of America, Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States of America, Amendment 14, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 United States Code, Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Salado, Texas, is a small community located in Central Texas. In 1981, Petitioner Nolan L. Kinsey was appointed Superintendent of the Salado Independent School District by its Board of Trustees. He held a term contract which was reviewed annually by the Board and was extended by it periodically. In January of 1988, a

majority of four members of the seven member Board voted to extend Kinsey's contract until June of 1990. In May of 1988 an election was held for three positions on the Board. The election and the political campaigns preceding it were matters of great controversy in the small community, with two groups, or factions, vying for control of the Board of Trustees. One of the groups supported the re-election of one Berry, who was then president of the Board, and two other candidates who were running with him as a slate. The other group supported an opposing slate of candidates, one member of which, one Hagler, was a member of the Board who had voted against the recent extension of the Superintendent's contract. Kinsey's superintendency became an issue in the election with the Berry slate supporting Kinsey as Superintendent, and the Hagler slate opposing him.

During the election campaign, Kinsey supported the Berry slate of candidates. Although he did not make financial contributions to them, serve on their campaign committees, or make public speeches in their favor, he did have numerous private conversations with Salado citizens in which he voiced support for the Berry candidates and concerns about the Hagler candidates. In addition, he caused a letter complimentary of Berry's performance on the School Board to be published in the local newspaper.

The Hagler slate won the election by a wide margin and formed a new majority on the Board. The Board began frequent meetings in executive session in which it was split four to three over whether Kinsey should be removed from his post. Following the rejection by Kinsey of the majority's offer to "buy-out" the balance of his

contract, and an acrimonious meeting with the Texas Education Agency which had lowered the accreditation rating of the school district, the Board voted four to three to permanently relieve Kinsey of his duties with full pay and benefits, the motion to be immediately effective.

Kinsey filed suit in the United States District Court for the Western District of Texas, Waco Division, pursuant to Title 42 U.S.C. § 1983 and the jurisdictional provisions of Title 28 U.S.C. §§ 1331 and 1343. He alleged that the Board majority's action in terminating him from his position had been done in retaliation for his exercise of freedom of speech and association in violation of his rights under the First and Fourteenth Amendments to the Constitution of the United States, and that, because he had been denied notice and an opportunity for a hearing, he had been terminated without due process of law in violation of the provisions of the Fourteenth Amendment. The District Court granted summary judgment on the due process claim, holding that because Kinsey had been awarded all the financial benefits due under his contract, he had not been deprived of property and no process was due. The District Court held a jury trial on Kinsey's First Amendment claims. During the trial, each of the Board members who had voted in the majority to terminate Kinsey's contract denied that his (the individual Board member's) decision had been influenced in any way at all by Kinsey's political activity, and three of the four members denied any knowledge at all of Kinsey's political activity. The jury found that Kinsey's exercise of First Amendment rights in relation to the School Board election was a substantial or motivating factor in the Board's decision to terminate his employment, and that Kinsey

would not have been terminated if he had not engaged in the conduct. It awarded Kinsey damages in the amount of $250,000.00.

The School District filed a Motion for Judgment Notwithstanding the Verdict which the District Court granted. The District Court held that Kinsey's speech had not addressed matters of public concern, and, even if it had addressed matters of public concern, it was too disruptive of the public employer's efficient operation to be afforded First Amendment protection. (App. 63-64).

Kinsey prosecuted an appeal to the United States Court of Appeals for the Fifth Circuit. On original submission, a panel of that Court, with one judge dissenting, reversed the judgment of the District Court. (App. 34). On the School District's motion, the Court granted a rehearing *en banc* and vacated the panel opinion, affirming the judgment of the District Court. (App. 1). A plurality of the *en banc* Court observed:

> Kinsey's activities touched on matters of great public concern; but, because his position was so high-level and confidential, not much opposition to the new majority was required in order to disrupt, and prevent, effective performance. (App. 18).

ARGUMENT

The Court of Appeals in this case concluded that Kinsey's claim involved both the freedom of speech and freedom of association under the First Amendment. Accordingly, in evaluating Kinsey's claims it applied a

balancing test synthesized from this Court's decisions in *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), (both involving speech), and the decisions in *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), and *Branti v. Finkle*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), (involving political affiliation and patronage discharges). (App. 10).

The Court observed that in applying its balancing test to cases involving public employees occupying policymaker or confidential positions, the government's interest as employer more easily outweighs the employee's as a private citizen, citing this Court's opinion in *Rutan v. Republican Party of Illinois*, 497 U.S. ___, 110 S. Ct. 2729, 111 L. Ed.2d 52 (1990), although the "party affiliation" exception was not an issue in that case. See 110 S. Ct. 2375, note 5, 111 L.Ed.2d 64, note 5. The Court of Appeals then concluded that Kinsey occupied both a policymaking *and* a confidential position, (App. 16-18), but stopped short of holding that political loyalty to a majority of the Board of Trustees was an appropriate requirement for the effective performance of the position involved. (App. 18).

Under the test adopted by the Court of Appeals, the public employer need not shoulder the burden imposed by *Branti v. Finkel, supra*, and demonstrate a "compelling interest" in infringing First Amendment rights of its employee by proving that political loyalty is necessary for the effective performance of the employee's position if the position may be described as "confidential" or "policymaking"; and, if that employee's speech or association

involves core pubiic concerns, the employer may avoid the "stronger" showing of disruption required by *Connick v. Myers, supra,* before imposing discipline or termination in such circumstances.

In this case the Court of Appeals found that Kinsey's speech and association involved matters of "great public concern" and that the views he expressed on the subject were "most relevant", (App. 16), but it held that because of the nature of his position "not much" opposition to the new majority of the Board would cause disruption and prevention of effective performance. (App. 18). As a result, although Kinsey's conduct was neither " . . . hostile, abusive or insubordinate so as to disrupt significantly the continued operation of the office . . . ", the Court of Appeals found Kinsey's interests to be outweighed by those of the Board in the effective provision of public services. (App. 18-19). As Judge Goldberg, joined by Judge Williams, dissenting, observed: "A confidential employee is doomed to fail a test weighted as heavily as that devised by the plurality." (App. 27).

This Court has not addressed the question of the appropriate test to be used to evaluate a discharged public employee's claim that he has been discharged for the exercise of protected rights of speech and association, and it has not directly addressed the scope of the concept that certain public employees in certain positions may not enjoy First Amendment protection. Thus, in this case, the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. Compare Supreme Court Rules, Rule 10.1.(c).

As to Question Number 2:

The Court of Appeals, in the application of the balancing test it formulated, found that Kinsey occupied the position of a "high-level policymaker", (App. 16), whose First Amendment rights are more easily outweighed by the public employer's interests. (App. 14). As a result, it concluded that "not much" opposition from Kinsey to the new majority of the Board was required in order to disrupt the effective performance of the school district. (App. 18). In applying the test, the Court treated the issue of the nature of Kinsey's position as a matter of law. Other Circuits hold that the question of whether an employee occupies a confidential or policymaking position, (or whether party loyalty is necessary to the effective performance of the job), is a question of fact for the fact-finder, (in this case, a jury). *McCollum v. Stahl*, 579 F.2d 869 (4th Cir. 1978), cert. den. 440 U.S. 912, 99 S.Ct. 1225, 59 L.Ed.2d 460 (1979); *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981), cert. den. 455 U.S. 1021, 102 S.Ct. 1719, ___ L.Ed.2d ___ (1981); and *Soderbeck v. Burnett County, Wis.*, 752 F.2d 285 (7th Cir. 1985), cert. den. 471 U.S. 1117, 105 S.Ct. 2360, ___ L.Ed.2d ___ (1985). In this case, the School District sought no jury issues on the nature of Kinsey's position and did not tender the confidential or policymaking nature of his position as an affirmative defense to the jury. The approach taken by the Court of Appeals renders such findings of fact by the jury unnecessary because the issue of the nature of the employee's position will be evaluated by the court in the purely legal balancing of the employee's interests as citizen against the public employer's interest as employer.

As nearly as Petitioner can determine, only the First Circuit has expressly held that the nature of the employee's position is a question of law for the court. Compare *McGurrin Erhard v. Connolly*, 867 F.2d 92 (1st Cir. 1989).

Because the Court of Appeals has rendered a decision in this case in conflict with the decisions of another United States Court of Appeals on the same matter, this Court should grant review of this case in order to resolve the conflict. Compare Supreme Court Rules, Rule 10.1.(a).

As to Question Number 3:

In this case, the Court of Appeals found that Kinsey's speech addressed matters of great public concern, (App. 16), but it held that his First Amendment rights did not outweigh the School District's interest in the effective provision of public services. (App. 19).

During the trial on the merits, each of the four trustees who formed the majority which voted to terminate Kinsey's contract testified that Kinsey's activities in support of the Berry slate of candidates played absolutely no part in the decision to terminate Kinsey's services. Each of the four gave reasons for the decision which were wholly unrelated to any political activity on Kinsey's part. Three of the four testified that they were not even aware of Kinsey's position during the School Board election campaigns.

Trustee Hagler:

Q. All right, sir. What – in the course of the campaign, did you ever – did Dr. Kinsey ever tell you who he was supporting for the School Board?

A. No, sir, he did not.

Q. Did he ever tell you any sort of political philosophy that he had regarding board and superintendent relationships?

A. No, sir, he did not.

Q. Did anybody who supported Dr. Kinsey ever come and tell you who he was supporting or what he stood for in the election?

A. No, sir, he – they did not.

Q. Did you know from any source what Dr. Kinsey's position was in the election or any of the political activities, if any, that he was engaging in?

A. No, sir, I did not.

(R. III, p. 386)

and:

Q. All right. Let me ask you, sir, whether at any time during this whole process in the summer or the spring – the election in the spring of 1988, the summer of 1988, down to the time that you voted to suspend or to relieve Dr. Kinsey with full pay and benefits, did you ever know from any source what his political position was in the spring election campaign?

A. No, sir, I didn't, and I really didn't care what it was. I had no knowledge whatsoever.

Q. And – and – and did anything that he undertook or did of a political nature in that election campaign have anything to do with your vote to relieve him with full pay?

(Objection for leading sustained here)

Q. Will you state to the jury whether or not it had anything to do with it?

A. No, sir, it did not have anything to do with my decision.

(R. III, p. 620)

Trustee Bartlett:

Q. All right, sir. And we've had lots of testimony about who was running and so forth, and so I would like to move along rather quickly with you –

A. Okay.

Q. – and just ask you some – what I think are some critical questions about that campaign.

A. Okay, sir.

Q. Did Dr. Kinsey – in the course of your campaign for the School Board, did Dr. Kinsey ever express to you what his political platform or his philosophy of education or of Board-Superintendent relations was?

A. No, sir. We never discussed that.

Q. Did you ever have any conversation with Dr. Kinsey about his philosophy of Board-Superintendent relations before or during the election?

A. No, sir.

(R.III, p. 712)

and:

Q. All right. Did – did – did you ever learn from any source who Dr. Kinsey was supporting in the election?

A. No, sir.

(R.III, p. 713)

and:

Q. All right, sir. And then the time came down to August – July and August of 1988 – and I don't want to rehash all of this for the jury, but when it came down to your vote for suspending or relieving Dr. Kinsey with full pay and benefits –

A. Yes, sir.

Q. – on September the 10th, 1988, were you motivated in any way by any exercise of political rights that he may or may not have done back in the School Board elections in the spring of '88?

A. Oh, no, sir. That never even – that never even entered my mind, I never even thought about it.

(R.III, p. 714)

Trustee Hodge:

Q. Hello again, Mr. Hodge. Very briefly, Mr. Hodge, during the spring election campaign in 1988 for School Board in Salado, Texas, did you ever know who Dr. Kinsey was supporting in that election?

A. No. There was one letter written that I was aware of that he supported Don Berry, but there was three positions open.

(R.III, p. 771)

and:

Q. Did you ever construe that letter as urging anybody to vote for anybody?

A. No.

Q. Did you ever construe that letter – as setting forth or taking a stand on some character of political philosophy of the superintendent?

A. No.

Q. All right, sir. Did you know from any source who Dr. Kinsey wanted the people to vote for or what political philosophy he held during that election campaign?

A. Not really, other than this. You know, you would think from reading that that he was supporting Don. But like I say, there were three positions available.

Q. All right, sir. And going now all the way back down and around the summer of '88 to September the 10th of 1988, did any political activity on the part of Dr. Kinsey play

any role at all in your decision to vote for relieving him with full pay and allowances?

A. No.

(R.III, p. 772)

Trustee Barrentine:

Q. All right, sir. Let's go back to the election of '88. Did Dr. Kinsey ever tell you what his position was, who he was supporting in the election of 1988 School Board election?

A. No, sir.

Q. Did you ever know from any other source who he was supporting or what political philosophy he was standing for?

A. I did not know, no sir.

(R.III, p. 753)

and:

Q. Did any political activity, if there was any, in the Board election of 1988, play any role at all in your decision to vote for his relief on September 10th, 1988?

A. None whatsoever.

(R.III, p. 753)

Thus, according to the School District's evidence at trial, Kinsey's speech and political association caused no disruption of the effective performance of the School District's mission. Despite this fact, the Court of Appeals proceeded to perform a balancing test in which it weighed the government's interest in the efficient performance of services against the employee's interest as

citizen. This holding is contrary to the decisions of several cases from the United States Court of Appeals for the Tenth Circuit, which hold that when the public employer asserts that a discharged public employee's speech played no part in the decision to terminate or otherwise discipline the employee, there is no "government interest" to balance against the employee's interest, and the employee's speech must be considered to be protected. Compare *Copp v. Unified School District No. 501*, 882 F.2d 1547 (10th Cir. 1989); *Ware v. Unified School District No. 492*, 881 F.2d 906 (10th Cir. 1989); *Rankin v. Unified School District No. I-3*, 876 F.2d 838 (10th Cir. 1989); and *Saye v. St. Vrain Valley School District, RE-1J*, 785 F.2d 862 (10th Cir. 1986). Logically, when the public employer denies that the disciplined or terminated employee's speech or association had anything to do with the adverse employment decision, describing the former employee's position as "confidential", or "policymaking", or one for which partisan loyalty is necessary for effective performance, is irrelevant because the employer is asserting that no disruption has occurred. As the Tenth Circuit holds, in those circumstances, the public employer is asserting no interest to balance against that of the public employee. This is to be contrasted with this Court's speech and affiliation cases, in which it has generally been undisputed that the employee's speech or affiliation was the cause of the adverse employment action by the public employer.

Because this aspect of the decision of the Court of Appeals in this case is in clear conflict with the decisions of the Court of Appeals for the Tenth Circuit in the same matter, the Court should grant review in this case in

order to resolve the conflict. Compare Supreme Court Rules, Rule 10.1.(a).

CONCLUSION

The opinion by the Court of Appeals for the Fifth Circuit has created a balancing test for First Amendment public employment cases which appears to reduce the burden placed by this Court's prior cases on the public employer who makes a decision adverse to the public employee based on the employee's exercise of speech or association. The opinion conflicts with cases from other circuits on the means by which a determination of the nature of the public employee's position is to be made, and conflicts with cases from another circuit on the effect to be given the public employer's denial that the employee's speech or association was the cause of the adverse employment decision. For these reasons the Court should grant certiorari to review this case.

Respectfully Submitted,

McDonald & Malone
Attorneys at Law
P. O. Box 1672
Waco, Texas 76703-1672
(817) 754-7317
FAX (817) 754-1466

Charles M. McDonald
Attorney for Petitioner
Texas Bar No. 13537000

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-1717

DR. NOLAN L. KINSEY,

Plaintiff-Appellant,

VERSUS

SALADO INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas

(January 3, 1992)

Before CLARK, Chief Judge, GOLDBERG, POLITZ, KING, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER, BARKSDALE, and Emilio M. GARZA, Circuit Judges.*

BARKSDALE, Circuit Judge.

---

* Judge Harold R. DeMoss, Jr. was sworn in after this case was argued to the en banc court and elected not to participate in this decision.

We took this case en banc to consider the protection *vel non* afforded by the First Amendment (as incorporated by the Fourteenth) to a public school superintendent, Dr. Nolan L. Kinsey, who opposed through speech and affiliation the winning slate in a school board election and was relieved of his duties (but with full compensation) by the new Board. Kinsey sued the Salado Independent School District and others (the School District), including asserting claims for violations of due process under the Fourteenth Amendment and freedom of speech (including of association) under the First. Summary judgment was granted against the former; judgment notwithstanding the verdict, against the latter. A divided panel reversed on the First Amendment issue. 916 F.2d 273.[1] We reach a different conclusion and **AFFIRM**.

I.

Salado, Texas, is a small community. In 1988, there was considerable concern about the operation of its schools. Kinsey had served as superintendent since 1981, pursuant to a contract reviewed annually and extended periodically. In May 1988, elections were held for three positions on the seven member school board. Two groups sought board control, and the concern primarily centered on Kinsey. Controversy surrounding him had begun in

---

[1] It did not reach the due process claim. (Kinsey had requested that it be addressed only if the judgment on the First Amendment claim was not reversed.) Because we took this case en banc, and did not provide otherwise, the panel opinion is vacated. 5th Cir. Loc. R. 41.3 and our Internal Operating Procedure for Fed. R. App. P. 35.

1984. The factors fueling it in 1988 included a new grading system, teacher certification (including teaching outside qualified area), and the division of authority between the Board and superintendent.

In January 1988, a few months before the elections, Kinsey's contract had been extended for a two-year term (through June 1990), but only by a vote of four to three. Well in advance of the elections, Kinsey had become aligned with the four-member Board majority, including its president, Don Berry. Berry and two others from the majority were up for re-election and ran as a slate (Berry's). One of the members of the Board minority – Glen Hagler, who had shortly before voted against renewing Kinsley's contract – and two others (Hagler's) ran against Berry's. As noted, one issue concerned the Board's role: Kinsey's view was that the Board established policy, but he was to run the schools on a daily basis.

Berry's supported Kinsey's superintendency; Hagler's opposed it. Likewise, Kinsey openly expressed support for Berry's and opposition to Hagler's. Kinsey supported Berry's, because Berry shared a similar view of the Board's role. Kinsey was concerned that Hagler's would become involved in the daily operation of the schools. In addition, he was concerned that if Hagler's were elected, his job would be in jeopardy; this was one of the reasons why he was active in the campaign. Kinsey did not make any financial contributions, serve on any committees, or make any speeches. He did, however, have numerous conversations with Salado citizens in which he voiced support for Berry's and concerns about

Hagler's.[2] In addition, as part of his political support for the Berry slate, he had a letter published in the local newspaper, in which he complimented Berry on his performance on the Board.

Essentially, a vote for Berry's was viewed as a vote for Kinsey; a vote for Hagler's, as a vote against him. Following one of the largest ever voter turnouts for such elections, Hagler's won by a wide margin and formed a new majority with Board member Joe Barrentine, who had not been up for re-election. As a member of the prior Board, he, like Hagler, had voted in January 1988 against renewing Kinsey's contract. Barrentine and Hagler became the new Board president and secretary, respectively.

Simply put, immediately after the election, the situation went from bad to worse. There was a strained relationship between Kinsey and the new Board, to put it mildly.[3] It began meeting frequently in executive session

---

[2] On cross-examination, Kinsey testified that he had been "against [the Hagler slate's] election." When asked how he had been "openly against it", he replied: "Anybody that asked me what my opinion of . . . the election was, who was running, who I felt like should be on the Board, I voiced my concerns." He "had quite a number of [these] conversations" with Salado residents.

[3] For example, Kinsey testified that shortly before the first post-elections regular Board meeting, Barrentine told him: "Tell [your father] that we're not going to fire you Tuesday night." Kinsey stated that "the implication was, 'We're not going to do it [that] night, but down the road.' " As another example, Hagler testified that Kinsey would not allow him, in his capacity as Board secretary, to remove the policy manual from Kinsey's secretary's office to a room nearby, in order to work with it.

about Kinsey. Lawyers were brought in on both sides. In late July 1988, after an unsuccessful attempt to buy-out Kinsey's contract, the Board agreed to set aside for six months the issue of his contract – until the usual January evaluation. For the interim, the Board issued directives regarding the manner in which he was to perform. There was disagreement regarding Kinsey's compliance with them. The Board majority felt that he rejected the directives; the minority, that he made reasonable efforts to comply.

Following issuance of the directives, the Board met with the Texas Education Agency to discuss its July 1988 evaluation of the district. That evaluation had lowered the accreditation rating, including because of the poor relationship between the Board and Kinsey (governance problem) and issues related to teacher certification (including misassigned teachers). Following that meeting, during which the Agency Administrator instructed the Board to solve the "governance problem", the Board scheduled a special session to discuss the termination or suspension of Kinsey's contract. In September 1988, the Board, by a vote of four to three, relieved him of his duties, but with full pay and benefits.

Kinsey promptly sued, including pursuant to 42 U.S.C. § 1983.[4] The complaint leaves no doubt about Kinsey's open opposition to, including association against, the new majority. It alleged that not later than April 1988, the Board had been "divided into two political factions", with Kinsey associated with, and supported by, the majority (including Berry) and with the minority

---

[4] The members of the majority were sued individually.

"increasingly critical of [Kinsey], as were their supporters in the community"; that prior to the elections, Kinsey had been "openly against the political platform and election of" the two new members and that this had been "well known to all of [the] individual defendants and to their community supporters"; and that immediately after the elections, the new majority "set out to terminate [him] . . . in retaliation for his association with their political opponents." Kinsey charged, *inter alia*: that his contract was recognized by Texas law as a property interest and, contrary to the Fourteenth Amendment, had been terminated without procedural due process; and that his First Amendment rights had been violated, because he had been terminated as a result of his "active support of and association with the political opposition" to the majority, who had retaliated against him "because of his political position, and because of his speaking out for candidates of his choice". Kinsey also raised numerous pendent state law claims, including that his termination violated state law.

The district court granted summary judgment against the claims as to the Board members in their individual capacities and against the federal claims, except as to the First Amendment. It also granted the School District's unopposed motion to dismiss the pendent claims.[5] At trial on the First Amendment claim, and following Kinsey's case-in-chief, the School District moved for a directed verdict, including because Kinsey's "interest as a

---

[5] On appeal, Kinsey does not contest these rulings.

citizen in the exercise of whatever *speech* or *political activity* he engaged in [was not] outweighed [by] the . . . governmental interests in the effective and efficient fulfillment of [the School District's] responsibilities to the public." (Emphasis added.) The court ruled that the motion was not granted at that time, indicating that it would reconsider it after the verdict.[6] At the close of the evidence, the School District so moved; and again, under Fed. R. Civ. P. 50(b), the district court took the motion under advisement pending the verdict. The jury returned a verdict for Kinsey, awarding him $250,000 in damages. It found by special interrogatories that he was terminated because of his "exercise of his First Amendment rights in relation to the" elections.

The district court granted the School District's Rule 50(b) motion for judgment notwithstanding the verdict, ruling, in part, that whether Kinsey's conduct was protected by the First Amendment was a question of law, which it was required to resolve based on the evidence. Upon that assessment, it held in part:

> Kinsey, as superintendent, was in a *close confidential relationship* to the board . . . . If the

---

[6] In so ruling, the court cited Fed. R. Civ. P. 50(b), which provided in relevant part that "[w]henever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." As discussed *intra* [sic], two of the grounds presented in the motion were legal issues: that Kinsey's comments did not involve a matter of public concern and, as noted, that his interests, as a private citizen, were outweighed by the government's.

> relationship between the two [is] antagonistic, the . . . School District's operation may be adversely affected. The record is clear that Kinsey's relationship with the Board worsened after the . . . election . . . .
>
> The Court finds that such disruptions undermined the effectiveness of the School Board. Kinsey's right *to speech or political opposition* to a majority of the officials elected by the community to govern him is outweighed by the board's legitimate interest in having a superintendent with loyalty to the new board's policies and directives.

(Emphasis added.) The district court denied the School District's alternative motion for a new trial, ruling that if it was reversed, the verdict should stand. *See* Fed. R. Civ. P. 50(c)(1).

II.

Our review is limited to the summary judgment on the Fourteenth Amendment and the judgment notwithstanding the verdict on the First.

A.

For the latter, we address legal issues at the threshold; if we rule against Kinsey, we stop. In so ruling, we do not consider whether the termination comported with state law. Instead, we focus on the reach of the First Amendment. Kinsey's activities included not only speech, but also political association or affiliation (a form of speech). Free and open speech and political affiliation are

part of the mix that molds and sustains this Nation. But, needless to say, Kinsey's exercise of those rights, as a private citizen, is not absolute, insofar as it conflicts with his role as a public employee. The protection accorded by the First Amendment to such activities is an issue we address not infrequently. Accordingly, the controlling law is well established. In applying it, however, a distinction must be made between cases involving only speech, or only political association, or a combination of the two. This case falls within the latter category.

As recently discussed in ***Coughlin v. Lee***, 946 F.2d 1152 (5th Cir. 1991), if only speech is in issue, the plaintiff, as a matter of law, must show: first, that it involves a matter of public concern ("determined by the content, form, and context of a given statement, as revealed by the whole record"); and second, that, "the interests of the [employee], as a citizen, in commenting upon matters of public concern [outweighs] the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." ***Id.*** at 1156-57 (quoting ***Connick v. Myers***, 461 U.S. 138, 147-48 (1983) and ***Pickering v. Board of Educ.***, 391 U.S. 563, 568 (1968)). If a plaintiff satisfies these issues, the case goes to the jury (on causation). ***Id.*** at 1157.

On the other hand, ***Coughlin*** provides that if political association is the only claimed reason for the retaliation, the employee is not first subject to (must not satisfy) the public concern legal issue, because "[f]reedom to associate with others for the common advancement of political beliefs and ideals is . . . protected by the First and Fourteenth Amendments." ***Id.*** at 1158 (quoting ***Elrod v. Burns***, 427 U.S. 347, 357 (1976)) (ellipses in ***Coughlin***). In

such cases, only balancing is at the threshold (the second legal issue when a case involves only speech):

> This court has subsequently interpreted Supreme Court jurisprudence to require a court evaluating discharge based on political activity to balance the First Amendment values implicated by those activities against the possible disruptive effect on governmental provision of services within the specific context of each case. [If the employee's interests outweigh the government's,] [t]he burden of proof of causation then follows . . . .

Id. (citing ***McBee v. Jim Hogg County, Texas***, 730 F.2d 1009, 1016-17 (5th Cir. 1984) (en banc)).

We review de novo the district court's resolution of the threshold legal issue(s). *E.g.*, ***id.*** at 1156; ***Dodds v. Childers***, 933 F.2d 271, 273 (5th Cir. 1991); ***Soderstrum v. Town of Grand Isle***, 925 F.2d 135, 139-40 (5th Cir. 1991). As noted, the earlier quoted allegations from Kinsey's complaint, as well as the proof at trial, leave no doubt that this case involves speech and political association. As such, it falls squarely under this court's en banc decision in 1984 in ***McBee***.

McBee was forged by the Supreme Court's pure speech decisions in ***Pickering*** (1968) and ***Connick*** (1983) and its political affiliation decisions in ***Elrod*** (1976) and ***Branti v. Finkel***, 445 U.S. 507 (1980). ***McBee***, 730 F.2d at 1011-14. There, the newly elected sheriff did not offer to reappoint his predecessor's deputies, some of whom had supported the predecessor's re-election with bumper stickers and attendance at political rallies. 730 F.2d at 1015. In addition, upon a former deputy's complaining to

county authorities about her fellow deputies not being rehired, the unaccepted offer to retain her in a lesser position was withdrawn. ***Id.*** at 1010. The court held:

> Surveying the Supreme Court authority which we have discussed, we conclude that the standard to be applied by us in resolving such public employee discharge or non-renewal cases as this is the ***Pickering*** balancing test. *Each case must be considered on its particular facts,* sifting through such factors and circumstances as the ***Connick*** Court outlined in order to strike the proper balance between the employee's *speech and associational rights* as citizen and the state's right as an employer to loyal and efficient service. Such cases might reasonably be expected to locate themselves on a spectrum; we conclude that they do.

Id. at 1014 (emphasis added).

In viewing that spectrum, our court noted that cases involving only discharge for political party affiliation, such as ***Elrod*** and ***Branti***, were "at the extreme of the employee's side, where little, if any, weighing is called for . . . . They did not campaign, they did not even speak: they merely thought." ***Id.*** For the other end of the spectrum, the employer's, our court cited ***Ferguson v. Thomas***, 430 F.2d 852 (5th Cir. 1970), and ***Duke v. North Texas State Univ.***, 469 F.2d 829 (5th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973), "where instructors had incited student disturbances that were sufficiently serious to call in question the ability of the academic authorities to maintain order on campus." ***Id.*** In so doing, it quoted from ***Ferguson***, written by Judge (now Chief Judge) Charles Clark:

> Here the proof before the district court showed that Dr. Ferguson exercised his rights of speech and association to such an extent as to seriously impair, if not to destroy, his effectiveness as an instructor in an organized program of academic tutoring. This was his choice to make. The college had no right *to control his speech or to curtail his freedom of association,* but they did have a right to terminate his employment as a classroom instructor at the point where the exercise of his constitutional privileges clearly over-balanced his usefulness as an instructor.

McBee, 730 F.2d at 1014 (emphasis added) (quoting *Ferguson*, 430 F.2d at 859).

Based upon the facts in *McBee*, the court found a "mid-spectrum situation", calling for *Pickering* balancing, as refined by *Connick*. *Id.* at 1015-16. Accordingly, it provided guidelines for the district court to apply on remand. "On the one hand, the court should consider to what degree the . . . [speech and association] involve 'public concerns.' On the other, the court should consider whether 'close working relationships are essential to fulfilling [the public employee's] public responsibilities.' " *Id.* at 1016 (quoting *Connick*, 461 U.S. at 151-52).[7] The *McBee* court "caution[ed] that [this] 'closeness' " concerned more than the number of persons involved, but, more importantly, was "a function of the particular 'public responsibility' being carried out." *Id.* If the district

---

[7] *Connick* held that "[w]hen *close* working relationships are essential to fulfilling public responsibilities, a *wide degree of deference* to the employer's judgment is appropriate." 461 U.S. at 151-52 (emphasis added).

court found it essential for such relationships to be close, "it must then determine whether the particular speech [and other conduct] sufficiently disrupted the working relationship as to prevent effective performance, *requiring a stronger showing of disruption as the employees' speech moves closer to core 'public concerns.'* " ***Id.*** at 1017 (quoting ***Connick***, 461 U.S. at 152) (emphasis added). In assessing such disruptive effect, the court should consider "the time, place and manner of the political activity" and "whether, taken in context, the particular activity should be considered sufficiently hostile, abusive or insubordinate, as to disrupt significantly the continued operation of the office." ***Id.***

McBee fell at mid-spectrum. Such is not the case here. In determining where this case should fall, in order to formulate and apply the proper balancing, we note that cases involving public employees who occupy policy-maker or confidential positions fall much closer to the employer's end of the spectrum, where the government's interests more easily outweigh the employee's (as a private citizen). In ***Rutan v. Republican Party of Illinois*** ___ U.S. ___, 110 S. Ct. 2729 (1990), an extension of ***Elrod*** and ***Branti***, the Supreme Court held that "promotion, transfer, recall, and hiring decisions involving low-level public employees [could not] be constitutionally based on party affiliation and support." ___ U.S. at ___, 110 S. Ct. at 2732. It further held: "A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views." ___ U.S. at ___, 110 S. Ct. at 2737 (citing ***Elrod*** and

Branti). In so holding, it noted that "[i]n *Elrod*, we suggested that policymaking and confidential employees probably could be dismissed on the basis of their political views. . . . In *Branti*, we said that a State demonstrates a compelling interest in infringing First Amendment rights only when it can show that 'party affiliation is an appropriate requirement for the effective performance of the public office involved.' " ___ U.S. at ___, n.5; 110 S. Ct. at 2735 n.5.

This court's recognition that policymaking or confidential employees' First Amendment rights are more easily outweighed in balancing interests predates *McBee*. *See, e.g.*, *Gonzalez v. Benavides*, 712 F.2d 142, 148 (5th Cir. 1983); *Stegmaier v. Trammell*, 597 F.2d 1027, 1038-40 (5th Cir. 1979). For example, this was recognized again, recently, in *Soderstrum* (1991). The chief of police had employed his nephew's wife as his secretary. Several years later, upon his defeat, the new chief did not rehire her. She sued under § 1983, claiming that the decision was based upon her political affiliation with the former chief and violated "her First-Amendment right to freedom of association." *Id.* at 137. This court stated: "The case reduces, then, to the question whether [the secretary] served in a position of confidence requiring complete loyalty to the police chief." *Id.* at 140.

> An incoming government official should be able to choose his personal secretary and should not be prevented by the First Amendment from replacing his defeated opponent's secretary and relative, at least when that person, as in this case, has unambiguously expressed her lack of confidence in the incoming official and her

> unwillingness to work in the new administration. . . . Because we find that [the secretary] fits the definition of a confidential employee, we need not address whether she was correctly deemed a policymaker as well.

Id. at 141 (citations omitted). This confidential employee finding was based, among other things, on the fact that the secretary "was privy to certain confidential files and documents." *Id.* at 140. As quoted earlier, each of these "case[s] must be considered on its particular facts". *McBee*, 730 F.2d at 1014. Although *Rutan* and *Soderstrum* do not involve a combination of speech and political association, they are instructive for our *McBee*-guided balancing here.[8]

In applying the *McBee* factors, one consideration is the extent to which Kinsey's activities involved matters of public concern. This is not a case involving only speech, where public concern is the first of two legal issues. This notwithstanding, the tests applied to determine whether speech is of such concern are instructive. As stated in *Coughlin*, "[i]ssues rise to the level of public concern if an individual speaks primarily in his role as a citizen rather

---

[8] *Coughlin* did involve speech and political association related to an election; but the plaintiffs, former deputy sheriffs, did not occupy policymaker or confidential positions. At the close of their case, a directed verdict was granted the defendant sheriff on the basis that the speech (surreptitiously providing damaging information to the media) did not address a matter of public concern. 946 F.2d at 1156. We affirmed the directed verdict on the speech claim, but reversed and remanded on the association aspect, because the directed verdict did not address it and proper discovery for it had been denied. *Id.* at 1158-60.

than as an employee, or if the information conveyed is of 'relevance to the public's evaluation of the performance of governmental agencies.' " 946 F.2d at 1157 (quoting ***Day v. Southpark Indep. School Dist.,*** 768 F.2d 696, 700 (5th Cir. 1985), *cert. denied,* 474 U.S. 1101 (1986) (footnote omitted)). Notwithstanding Kinsey's interest in retaining his position as superintendent, his speech and association involved matters of great public concern – the performance of elected officials. Needless to say, his activities, especially the views he expressed in numerous conversations with Salādo residents, were most relevant in evaluating the performance of the Board.

Another consideration is whether a close working relationship is essential. Kinsey occupied a high-level policymaker position. Under Texas law, the Board is a corporate body with the exclusive power to manage and govern its district's schools. **V.T.C.A. Education Code** § 23.26 (1987). It employs the superintendent, ***id.*** § 23.28, who "is the educational leader and the administrative manager of the school district." ***Id.*** § 13.351(a) (Supp. 1991); *compare* ***id.*** § 13.352(d) (detailed responsibilities for principal as opposed to general statement for superintendent). *See* ***Stegmaier,*** 597 F.2d at 1027, 1035 (policymakers may be identified, in part, "as public employees whose responsibilities require more than simple ministerial competence, . . . and whose discretion in performing duties . . . is not severely limited by statute, regulation, or policy determinations made by supervisors"). "[C]onsideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals." ***Gonzalez,*** 712 F.2d at 149 (*quoting* ***Elrod,*** 427 U.S. at 368). One of Kinsey's

primary duties was to advise the Board. He met with it in executive session and offered opinions and recommendations to guide its decisions. Kinsey also handled the School District's finances, and made recommendations to the Board on hiring teachers and principals. And, because the Board can act only by majority vote at duly called meetings, it was dependent upon Kinsey, its chief administrator, to implement its policies and decisions. *See* ***Stegmaier***, 597 F.2d at 1035 (policymaker also identified as employee whose decisions create or implement policy).

Therefore, he possessed the power to "make or break" Board policies which "arguably afforded him the opportunity to thwart or to forward [its] goals". ***Gonzalez***, 712 F.2d at 149. In addition to occupying a sensitive, high-level policymaking position in relation to the Board, Kinsey occupied a confidential relationship. *See* ***Soderstrum***, 925 F.2d at 140-41; ***Stegmaier***, 597 F.2d at 1040 (deputy circuit clerk held confidential employee). During executive sessions, he could be called on to advise the Board on matters relating to real property transactions, personnel grievances and hearings, student discipline cases, and other confidential matters. Vernon's Ann. Texas Civ. St. art. 6252-17, § 2(f), (g), (h), (j), (m), and (r) (Supp. 1991). Moreover, he was custodian of the Board's confidential records. ***Id.*** art. 6252-17a § 5(a) (Supp. 1991). These could include personnel and litigation files, sealed bids, drafts and working papers in the preparation of proposed rules and policies, student records and other confidential documents. ***Id.*** art. 6252-17a § 3(a)(2), (3), (4), (5), (11), (14), (17), and (22) (information deemed confidential by Texas Open Records Act).

In sum, a close working relationship was essential. Kinsey concedes this (in his en banc brief): "the relationship between the board of trustees of a school district and its superintendent is, of necessity, a close one." Accordingly, we turn to whether his activities "sufficiently disrupted the [close]working relationship as to prevent effective performance." ***McBee***, 730 F.2d at 1017. Toward that end, we are guided by this case falling very close to the employer's end of the ***McBee*** spectrum. Kinsey's activities touched on matters of great public concern; but, because his position was so high-level and confidential, not much opposition to the new majority was required in order to disrupt, and prevent, effective performance.

In determining disruption, one factor we consider, as instructed by ***McBee***, is the "time, place and manner of the political activity." ***Id.*** Kinsey's association and position in the elections was well known. *He was the issue.* As he admitted, he expressed his concerns about the Hagler slate to anyone who asked him; and he did so on numerous occasions. His published letter to the newspaper was for the purpose of demonstrating his support for Berry. Admittedly, considering the last of the ***McBee*** disruption factors, his conduct was neither "hostile, abusive or insubordinate [so] as to disrupt significantly the continued operation of the office", ***id.***; but, there can be no doubt that as a result of his activities, he could not have an effective relationship with the Board. His relationship with Barrentine and Hagler had been adverse to begin with. This had developed well in advance of the elections, in which he opposed Hagler's re-election. Accordingly, Kinsey's "First Amendment rights [do not]

outweigh the [Board's] interest in the effective provision of public services." ***Coughlin*** 946 F.2d at 1157.

In short, in light of his high-level policymaker and confidential position, Kinsey stepped over the line. As observed in ***Ferguson***, "[t]his was his choice to make."430 F.2d at 859. But, in so doing, he abandoned any shelter otherwise provided him by the First Amendment. Because Kinsey fails the ***McBee*** balancing, this case should not have been submitted to the jury. Therefore, the district court correctly granted judgment notwithstanding the verdict.

B.

Contrary to the summary judgment, Kinsey maintains that he was denied procedural due process under the Fourteenth Amendment.[9] He must first establish deprivation of a constitutionally protected property interest. ***Cleveland Bd. of Educ. v. Loudermill***, 470 U.S. 532, 538 (1985). Otherwise, we do not consider "what process is due". ***Id.*** *Accord* ***English v. Hairston***, 888 F.2d 1069, 1070 (5th Cir. 1989); ***Darlak v. Bobear***, 814 F.2d 1055, 1061 (5th Cir. 1987). Although relieved in September 1988, Kinsey received full compensation through June 1990. Because of the compensation, the district court held that Kinsey had not been deprived of the requisite interest. He

---

[9] We review a summary judgment *de novo*, using the same standards as the district court. *See* Fed. R. Civ. P. 56; *see, e.g.*, ***Crenshaw v. General Dynamics Corp.***, 940 F.2d 125, 127 (5th Cir. 1991); ***Texas Commerce Bank-Fort Worth v. United States***, 896 F.2d 152, 155 (5th Cir. 1990).

contends, however, that he possesses a property interest in the non-economic benefit of the duties and responsibilities as superintendent.

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." ***Board of Regents v. Roth***, 408 U.S. 564, 577 (1972). "Property interests in continued employment 'are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law.' " ***Soderstrum***, 925 F.2d at 138 (*quoting* ***Roth***, 408 U.S. at 577). Kinsey is unable to cite any provision of the Texas Education Code, or other source, which bestows a property interest in the *position* of superintendent. And, as this court held in ***Davis v. Mann***, 882 F.2d 967, 973 n.16 (5th Cir. 1989) (*quoting* ***Jett v. Dallas Indep. School Dist.***, 798 F.2d 748, 754 n.3 (5th Cir. 1986)), "unless the state 'specifically creates a property interest in a noneconomic benefit – such as a work assignment – a property interest in employment generally does not create due process property protection for such benefits.' "

Davis claimed that he had been deprived of a constitutionally protected property interest when he was dismissed from the residency program at the University of Mississippi Dental School, allegedly in retaliation for exercise of First Amendment rights. This court held:

> [W]e need not inquire what process was due or whether that process was afforded Davis prior to his termination from employment, because it is undisputed that Davis received his full salary under his employment contract. We have found

> that an employee suffers no compensable damage from an early employment termination where he has been paid his full salary for the contract year.. . . .
>
> We also find no support in the case law for Davis's claim that he is entitled to the duties and responsibilities of his employment as specified under the contract.

Id. at 973 (*citing* ***Robinson v. Boyer***, 825 F.2d 64, 67 (5th Cir. 1987) (plaintiff fully compensated when he received his full salary for the contract year); ***Jett***, 798 F.2d at 753-54 (contract did not "create a property interest in the intangible, noneconomic benefit of [plaintiff's] assignment as coach")). *See also* ***Cannon v. Beckville Indep. School Dist.***, 709 F.2d 9, 11 (5th Cir. 1983) (superintendent terminated without hearing did not have due process claim, because he had been paid "the full amount due him under the existing contract").

Kinsey did not have a constitutionally protected property interest in the non-economic benefit of serving as superintendent. Accordingly, we do not reach his contention that he did not receive due process.

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

HIGGINBOTHAM, Circuit Judge, with whom POLITZ, GARWOOD, and DAVIS, Circuit Judges, join specially concurring:

I write separately because I reach the same conclusions as the plurality, but by a different path, both parallel to the plurality's approach and not foreclosed by it.[1] Trustees of the Salado School District could deliver on the mandate of their election only through Superintendent Kinsey. They were entitled to a superintendent who shared their management philosophy. This superintendent did not. To the contrary, Kinsey and the newly elected board held diametrically opposed views on their respective roles in management. Certainly, the board was not obligated to hire a superintendent who did not share their philosophy, and the first amendment does not require them to retain such a superintendent.

This trumping of state interest over first amendment interests is expressed in a judicial creature – a policy-maker. Such a policy-maker cannot secure job tenure under the first amendment by publicly espousing his antagonizing philosophy or by engaging in other political activity in its service. Doubtless, such activity will enjoy the protection of the first amendment for many purposes, but it will contain no job security. As we have explained:

> There is a governmental interest in securing those unique relationships between certain high level executives and the elected officials at whose grace they serve. For this narrow band of

---

[1] I fully concur with the plurality's treatment of the property issues.

> relationships, refusing to grant First Amendment tenure would seem to take a way little freedom not already lost in accepting the appointment itself, at least when the appointive job has the sweep of authority and discretion as to be central to the elected official's duty. The holder of such a position can hardly have any reasonable expectation but that his policy choices must publicly fall within the protective license issued by his appointing officer. To say that loss of that job is the price for his public declaration chills little.

Gonzalez I, 712 F.2d at 148.

Of course, a public policy official may not be fired for first amendment protected activity unrelated to his mission unless that activity would frustrate performance of his tasks. This poses a different inquiry. If, for example, public policy officials were to speak out about public issues, we would proceed with the balancing inquiry of *Connick*. As we explained in *Gonzalez*:

> If [the government interest in having loyal policymaking employees] is implicated the trial court should then weigh that interest against the asserted rights of free speech. That weighing is required because we do not decide that all speech by persons in such relationships is unprotected. Rather, the speech must be weighed against its impact upon the relationship and that relationship's role in the elected official's discharge of his duties.

Id. at 150.

When, however, a policymaker is fired because of views related to his mission, there is no further weighing,

whether or not these views have been publicly espoused. In a practical sense, the balances have already been struck by the categorization of a worker as a policymaker. *See Hall v. Ford*, 856 F.2d 255 (D.C. Cir. 1988); *Soderstrum v. Town of Grand Isle*, ___ F.2d ___ (5th Cir. 1991). Categorization versus balancing is familiar to first amendment jurisprudence. Although they both require accommodating competing values, they differ in that the policymaker categorization strikes the balance across cases, whereas the *Connick* balancing is from case to case. Categorization also shifts the case by case decisional process to definition. It puts a premium on definition. The Supreme Court has softened the procrustean bite by requiring the state to demonstrate not only that a worker was a "policymaker" or held a "confidential" position, but also whether conformity of view is job related. As Justice Stevens put it:

> The ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Branti v. Finkel, 445 U.S. 507, 518 (1979).

This case has none of the problems of defining at the margin nor of job relatedness. Kinsey's vision of respective roles of board and trustees need not be swallowed by the board. They go to the heart of the job. Stated another way, it is plain that a common vision of their respective roles is "an appropriate requirement for the effective performance of the public office involved," *id.* at 518. This, for me decides this case.

KING and WIENER, Circuit Judges, concur in the judgment.

Kinsey v. Salado Independent School District
No. 89-1717

GOLDBERG, Circuit Judge, with whom Williams, Circuit Judge, joins dissenting:

> And I honor the [person]who is willing to sink
> Half his present repute for the freedom to think,
> And, when he has thought, be his cause strong
> or weak, Will risk t' other half for the freedom to
> speak.[1]

I revisit Salado and, again, sound the schoolbell for the freedoms protected by the First Amendment. The plurality relegates a school district's "educational leader and . . . administrative manager" to an almost unspeakable role. Tex. Educ. Code § 13.251(a) (Vernon 1991). The Constitutional evil of today's decision is that it summarily strips the superintendent of a badge of citizenship – the right to participate publicly in an election. The jury found that the Salado school board would not have discharged the superintendent but for his public expression during the election. The plurality punishes Kinsey by forcing him to stand in the corner like a small schoolchild and silently observe while his neighbors, friends and

---

[1] James Russell Lowell, A Fable for Critics (1848).

colleagues debate the election issues and candidates amongst themselves and in the pages of the town newspaper.

The lesson this decision teaches is unmistakable. By permitting the school board to censor the superintendent's speech delivered in reasoned and measured terms, the court enforces a constitutional curriculum of authoritarianism rather than autonomy, suppression rather than speech, and public facade rather than public discourse. I do not believe the Constitution prescribes so cramped a lesson plan. I respectfully dissent. I confine this dissenting opinion to a succinct consideration of the overarching issues posited in the plurality opinion of an en banc court and the special concurrence. Much has been said that need not be repeated. I stand on the propositions of law and the analysis of facts articulated in the panel majority opinion, and neither repeat nor redact that previous writing.

I.

In *Kinsey v. Salado Indep. School Dist.*, 916 F.2d 173 (1990), the panel majority applied this circuit's public employee speech and affiliation jurisprudence, as the en banc plurality does today. Although we utilize the same grading scale as the en banc plurality, we ultimately give Kinsey the highest grade in the class. The plurality, however, awards top honors to the school board. We quarrel not about the assigned task, but about the correct balancing test and answer dictated by the Constitution.

I note that our discourse on the designated subject contains certain similarities. Kinsey's activities certainly

"involved matters of great public concern." Plurality op. at 15; *see Kinsey*, 916 F.2d at 278 (Kinsey's statements concerned the public election of the school board, which became an issue "of great public importance" in Salado) (citation omitted). Since "a school superintendent and [the] school board stand in a close and confidential relationship," a close working relationship between Kinsey and the school board was essential to fulfilling the school board's responsibilities to the public. *Kinsey*, 916 F.2d at 280; *cf.* Plurality op. at 16-18 (concluding that Kinsey "occupied a high-level policymaker position" and "a confidential relationship").

The examination administered by the en banc plurality differs in several crucial respects from that proctored by the panel majority. The en banc plurality emphasizes, and I recognize, that the First Amendment rights of a "confidential employee . . . are more easily outweighed" by the interests of the government than the First Amendment rights of a *non*-confidential or *non*-policymaking employee. Plurality op. at 14 (citations omitted); *see id.* at 12 n.7 and 13 (citations omitted). From this proposition, however, the plurality crafts a balancing test that vulnerably slants toward the employer's end of the spectrum. *See id.* at 13-15. *Kinsey's activities touched on matters of great public concern; but, because his position was so high-level and confidential, not much opposition to the new plurality was required in order to disrupt, and prevent, effective performance." Id.* at 18 (emphasis added). A confidential employee is doomed to fail a test weighted as heavily as that devised by the plurality.

This is the point where the panel majority's preparation of the exam divurges [sic] from that of the en banc

plurality. I agree that the correct query is "whether the particular speech [and other conduct] sufficiently disrupted the working relationship as to prevent effective performance" of the school board's responsibilities to the public. Plurality op. at 13 (citations omitted). The court quotes, but seemingly disregards, the language we deem critical to this balancing analysis: "[A]s the employee['s] speech moves closer to core 'public concerns,' " the law requires a " *'stronger* showing of disruption' " by the government. *Id.* "Kinsey's speech during the school board election was at the heart of First Amendment protection," so the school district bore a heavy burden to prove that Kinsey's activities so disrupted the working relationship as to prevent the efficient fulfillment of the school board's duties to the public. *Kinsey*, 916 F.2d at 280.[2]

McBee instructs us to consider two factors in determining whether the sufficient level of disruption occurred in the particular context of this case. Neither of the factors decisively tips the balance toward the government, even if we begin, as the plurality does, with a test overly weighted toward the employer's end of the spectrum. The "time, place and manner of the political activity" weighs in Kinsey's favor. *McBee v. Jim Hogg County,*

---

[2] *Cf. Gonzalez v. Benavides*, 774 F.2d 1295, 1302 (5th Cir. 1985) (protecting speech that "directly address[ed] matters of substantial concern" because speech did not significantly harm relationship with publicly elected officials, although public employee occupied sensitive, high-level position), *cert. denied*, 106 S.Ct. 1789 (1986); *Gonzalez v. Benavides*, 712 F.2d 142, 148 (5th Cir. 1983); (weighing required because court did "not decide that all speech by persons in such relationships [which require for job security loyalty at the expense of unfettered speech] is unprotected").

730 F.2d 1009, 1017 (5th Cir. 1984) (en banc). He merely conversed with other citizens concerning the upcoming school board elections and expressed his support for Berry in a letter published in the local newspaper. *Kinsey*, 916 F.2d at 278. In its analysis of the second factor, moreover, the plurality admits that the particular activities could *not* be "considered sufficiently hostile, abusive or insubordinate [so] as to disrupt significantly the continued operation of the office." Plurality op. at 19 (quoting *McBee*, 730 F.2d at 1017). Despite this explicit indication that it should shift the balance back toward the employee, the plurality concludes that "there can be no doubt that *as a result of [Kinsey's] activities*, he could not have an effective relationship with the Board." *Id.* (emphasis added); *see Thomas v. Carpenter*, 881 F.2d 828, 831 (9th Cir. 1989) ("disruption must be 'real, [and] not imagined'") (citation omitted), *cert. denied*, 110 S.Ct. 1475 (1990). The record, however, demands precisely the opposite deduction.

"[T]he School Board failed to prove that *Kinsey's public statements* adversely affected his working relationship with the School Board."[3] *Kinsey*, 916 F.2d at 280. Kinsey never publicly disavowed the school board's authority over him, but merely expressed in verbal and written form a reasoned preference for one school board candidate over another. Nor did Kinsey personally attack any

---

[3] We do not deny that the relationship between Kinsey and the school board deteriorated during the school board election and the subsequent decision to relieve Kinsey of his duties as superintendent. The record does not link the disruption to Kinsey's affiliation or speech. *Kinsey*, 916 F.2d at 280 & n.7.

of the new school board candidates. Nothing in the record supports the notion that Kinsey acted in an insubordinate manner toward the school board. In the aftermath of the election, Kinsey publicly pledged to *support* the school board. When the newly-elected school board issued specific directives, Kinsey attempted to comply with each directive. Nothing in the record shows noncompliance with any of the directives. *Cf. Gonzalez*, 774 F.2d at 1303 (holding that polite exchanges, lack of personal attacks, and offers to cooperate with employer showed that speech did not and was not likely to disrupt the government's operations). Kinsey testified that the school board never informed him that he had done anything wrong in carrying out his duties as superintendent. *Cf. McBee*, 730 F.2d at 1015 ("no evidence that their previous political activity actually interfered with the effective performance of their jobs").

The plurality posits a test that Kinsey could never pass. The plurality wholly relies on the one factor that weighs in the school board's favor, the right of the government employer to loyal and efficient service, and essentially disregards the other factors that support Kinsey's speech and associational rights.

> The character of the expressions [cannot] be ignored: the Constitution has not repealed human nature; and it is one thing to work with a subordinate who has expressed a reasoned preference for another superior and quite another to have forced on one's organization an individual who has blackguarded one's honesty and ability up and down the county.

McBee, 730 F.2d at 1017. The test formulated by the plurality ascertains the high scorer not by balancing, but by assigning a grade predetermined by the perceived nature of the relationship between the employee and the publicly elected officials. Such a test seems unfaithful to the balancing approach prescribed by our jurisprudence. *Id.* at 1016 (" 'First Amendment issues . . . not answerable by mechanical formulae' ") (citations omitted).

II.

The special concurrence advocates a test that bestows the highest score not by blind grading, but by favoritism. This bright-line test first asks if the employee's "party affiliation is an appropriate requirement for the effective performance of the public office involved," and, if the answer is "yes," forces that employee to step over the line into a category of public employees dischargeable solely for "views related to the employee's mission" – whether or not the employee *expresses* those views. This is the approach taken in the pure affiliation cases, but with a nod to expression flowing from the affiliation.

Almost ten years ago, this Court recognized the government's need for the political loyalty of certain high-level employees, not just to ensure effectiveness, but to prevent the obstruction of the "implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Gonzalez*, 712 F.2d at 148 (citing *Elrod v. Burns*, 96 S.Ct. 2673, 2687 (1976)). Yet we adhered to the balancing approach, holding merely that this important governmental interest should be *weighed* in the balancing process. *Id.* at 148, 150. I do not read *Gonzalez*

as limiting the mandate to balance these competing interests to cases involving employees that voice views "unrelated to their mission"; rather, the balancing focuses on whether the speech involved matters of "public concern," a term that might include views *both* related and unrelated to the particular employee's mission.

Gonzalez and *McBee* teach that we should weigh the employee's speech and associational interests against the impact on the relationship between the employee and the elected officials and the relationship's role in the elected officials' discharge of their duties. *McBee*, 730 F.2d at 1016; *Gonzalez*, 712 F.2d at 150. The panel majority did so. *Kinsey*, 916 F.2d at 280. Yes, Kinsey's views were "related to his [educational] mission." But the views were of "great public concern." And I emphasize that the record shows that Kinsey's activity did not catalyze any dissention in his relationship with the school board. That is precisely why the panel majority, in the final analysis, could not "den[y] the electorate . . . access to his unique point of view." *Id.* at 281.

The categorical approach endorsed in the special concurrence is fueled by the fear that the balancing test provided by our jurisprudence will allow a high-level employee to "secure job tenure under the first amendment by publicly espousing his antagonizing philosophy or by engaging in other political activity in its service." Special Conc. at 1. As noted by the panel majority, however, "*Mt. Healthy* requires the fact-finder to determine whether the employer would have suspended or fired the employee *regardless* of the protected speech." *Kinsey*, 916 F.2d at 281 n.9 (emphasis added). Elected officials confronted with an employee engaging in activities protected

by the First Amendment can terminate the employee for an otherwise valid reason – but that is not what happened in Salado. The record supports the conclusion that the school board would *not* have terminated Kinsey but for the public *expression* of his political affiliation.

III.

Few things are as desirable in an election as free and open debate. Few people are likely to be as well-informed on matters of educational policy and school board composition as a school superintendent. Yet the effect of today's ruling is to deny the public its right to hear the opinions of its superintendent on these issues. No concern for the efficient functioning of the school district requires that every drop of dissent be squeezed from its educational leaders.

The school term has drawn to a close, and I must bid farewell to Salado. I hope that this course marks not the end of a semester, but the beginning of a short recess. I yearn for the resolute return to a constitutional curriculum that will disavow today's denial of Dr. Kinsey's First Amendment rights and teach Salado's children of the precious freedoms promised in the First Amendment.

Dr. Nolan L. KINSEY, Plaintiff-Appellant,

v.

SALADO INDEPENDENT SCHOOL DISTRICT, et al., Defendants-Appellees.

No. 89-1717.

United States Court of Appeals,
Fifth Circuit.

Nov. 2, 1990.

Suspended superintendent of schools brought action against school board, asserting that the suspension was in retaliation for his exercise of First Amendment rights. The United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., granted school board's motion for judgment notwithstanding the verdict in favor of superintendent, and superintendent appealed. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) superintendent's speech in support of particular slate of candidates for election to school board was constitutionally protected; (2) superintendent's First Amendment rights outweighed interest of school board in maintaining working relationship with the superintendent; and (3) award of $250,000 was not excessive.

Reversed.

Gee, Circuit Judge, filed a dissenting opinion.

Appeal from the United States District Court for the Western District of Texas.

Before GOLDBERG, GEE and WILLIAMS, Circuit Judges.

GOLDBERG, Circuit Judge:

Dr. Nolan L. Kinsey ("Kinsey") was employed in Salado, Texas as Superintendent of Schools for the Salado Independent School District ("SISD"). Kinsey brought suit against the SISD, its Board of Trustees (the "Board") (the SISD and the Board will be collectively referred to as the "School District") and four members of the Board in their individual capacities to recover damages for violation of his constitutional right to freedom of speech and for violation of his right to due process of law under the Fourteenth Amendment to the United States Constitution. The district court granted the School District's motion for summary judgment on the due process claim. In the case at bar, the jury held for Kinsey on his First Amendment claim, but the district court granted the School District's Motion for Judgment Notwithstanding the Verdict, holding, as a matter of law, that Kinsey's speech was not protected by the First Amendment. REVERSED.

FACTS AND PROCEEDINGS BELOW

The School District employed Kinsey as Superintendent of Schools from 1981 until the Board suspended him with full pay and benefits on September 10, 1988. Kinsey was employed under a written contract which was extended periodically. In January 1988, the Board of Trustees voted to extend Kinsey's contract for a two-year term, to end June 1990. That following May of 1988, school board elections were held and three trustee positions on the ballot were contested. The political atmosphere in Salado at that time was highly partisan,

with two groups vying for control of the Board of Trustees.

Prior to the May 1988 elections, Kinsey had become politically aligned with the then majority of the Board, which included Board president Don Berry. Kinsey openly supported Berry's re-election, as well as the election of the two candidates who were essentially running on a "slate" with Berry (the "Berry Slate"). Prior to the election, Kinsey made many public statements concerning his views on the election, both in public meetings and in a local newspaper. Glen Hagler, an incumbent seeking election after appointment, Claude Hodge and Gary Bartlett ran against the Berry Slate of candidates. Candidates Hagler, Hodge and Bartlett subsequently defeated the Berry Slate. The newly elected Board members, together with incumbent Joe Barrentine, then formed a new majority on the Board.

Shortly after the election, the Board began to meet frequently in executive session to discuss Kinsey's contractual status with SISD. The Board was essentially split four members to three members in favor of terminating Kinsey's services. After an unsuccessful attempt to buy-out Kinsey's contract, the Board agreed to set aside the issue of Kinsey's contract until it conducted a review of Kinsey's performance in January 1989. In connection with this decision, the Board decided to issue certain directives or guidelines as to how the Board wanted Kinsey to conduct his job. Those directives were to form the basis for evaluating Kinsey's performance when the Board reviewed Kinsey in January 1989. The record indicates that a dispute existed among the Board members regarding Kinsey's compliance with these directives. The four-

member majority generally felt Kinsey had rejected the spirit of the directives, while the remaining three members believed he had made every reasonable effort to comply with the directives. Following a meeting with the Texas Education Agency, during which the Agency administrator told the Board to work out their differences with Kinsey, the Board President scheduled a special meeting to discuss the "Termination and/or Suspension of Superintendent Contract." The Board met in an executive session on September 10, 1988, and then publicly voted four to three to suspend Kinsey with pay.

In his complaint, Kinsey alleged deprivation of his property and liberty interests without due process of law, in violation of the Fourteenth Amendment. Kinsey's complaint further alleged that the new Board suspended him in retaliation for his public support of the Berry Slate during the Board elections. Following the School District's answer and discovery by the parties, the School District filed a motion for summary judgment. The district court granted the School District's motion on Kinsey's due process claims. The case proceeded to trial on Kinsey's First Amendment claims. The jury was properly instructed that they could find for Kinsey only if (1) he convinced them, by a preponderance of the evidence, that his statements during the School Board election were a substantial or motivating factor in the Board's decision to suspend him, and (2) the School District failed to convince them, using the same standard, that they would have suspended Kinsey absent Kinsey's statements during the election. The jury returned a verdict for Kinsey, awarding him $250,000 in damages.

Following the trial, the district court granted the School District's Motion for Judgment Notwithstanding the Verdict, holding, as a matter of law, that Kinsey's speech had not addressed matters of public concern. The district court also found that even if Kinsey's speech did address matters of a public concern, the speech was still not entitled to constitutional protection because it was too disruptive to the efficient operation of his public employer to be afforded First Amendment protection. The Judgment Notwithstanding the Verdict did not attack the jury's factual findings that the School Board was motivated by Kinsey's participation in the election and that the Board would not have suspended Kinsey absent that conduct.

Kinsey appeals the adverse grant of the School District's Motion for Judgment Notwithstanding the Verdict on two grounds. First, Kinsey contends that the district court erred in holding that as a matter of law Kinsey's speech failed to address matters of public concern and was purely private in nature. Secondly, Kinsey claims that the district court erred in holding that, as a matter of law, Kinsey's speech and political activity were too damaging to confidential relationships and disruptive of the efficient functioning of his governmental employer to be afforded First Amendment protection. We agree with both claims and reverse the district court's grant of the Motion for Judgment Notwithstanding the Verdict.

DISCUSSION

I. Introduction

A public employer clearly cannot condition public employment on a basis that infringes upon the

employee's constitutionally protected interest in free speech. *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06, 87 S.Ct. 675, 684-85, 17 L.Ed.2d 629 (1967) ("[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."); *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315, *reh'g denied*, 483 U.S. 1056, 108 S.Ct. 31, 97 L.Ed.2d 819 (1987) ("Even if [an employee] could have been discharged for any reason or for no reason at all, she may nonetheless be entitled to reinstatement if she was discharged for exercising her constitutional right to freedom of expression."); *Page v. DeLaune*, 837 F.2d 233, 237 (5th Cir.1988) ("A state may not discharge an employee for exercising his right to free speech on matters of public concern."). Supreme Court jurisprudence, as well as our own, has, however, recognized that government employees are not always as free to speak as private citizens. *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968); *Price v. Brittain*, 874 F.2d 252, 257 (5th Cir.1989). *Pickering* instructs us to strike "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568, 88 S.Ct. at 1734.

The Supreme Court subsequently refined the *Pickering* analysis in *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1689, 75 L.Ed.2d 708 (1983). In *Connick*, the Court stated that an employee's speech is only entitled to judicial protection if it addresses a matter of "public

concern." *See also Brawner v. City of Richardson,* 855 F.2d 187, 191 (5th Cir.1988). If the speech does not address a matter of public concern, then it is unnecessary to scrutinize the reasons for the discharge. *Connick,* 461 U.S. at 147, 103 S.Ct. at 1690; *Noyola v. Texas Dept. of Human Resources,* 846 F.2d 1021, 1024 (5th Cir.1988).

Accordingly, a court considering a public employee speech case must first address whether an employee's speech concerns a matter of public concern. Only after the speech passes this threshold test should a court engage in the *Pickering* balancing analysis. If the speech survives the *Connick-Pickering* analysis, the employee bears the burden of proving that his speech was a motivating factor in his dismissal. If the employee satisfies this burden, the burden shifts to the employer to prove by a preponderance of the evidence that the employer would have discharged the employee even in the absence of the speech. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 285-87, 97 S.Ct. 568, 575-76, 50 L.Ed.2d 471 (1977); *Bowen v. Watkins,* 669 F.2d 979, 987 (5th Cir.1982).

After applying the *Connick* public concern analysis, the district court found that Kinsey's speech was primarily of a private concern and therefore not entitled to First Amendment protection. In addition, the district court found that even if the speech did address a public concern, under the *Pickering* balancing test the speech was not entitled to First Amendment protection because the employer's interests outweighed Kinsey's interest in free speech.

II. Standard of Review

The inquiry into the protected status of speech is one of law, not fact. *Connick*, 461 U.S. at 150 n. 10, 103 S.Ct. at 1691-92 n. 108; *Brown v. Bullard Indep. School Dist.*, 640 F.2d 651, 653 (5th Cir.), *cert. denied*, 454 U.S. 828, 102 S.Ct. 120, 70 L.Ed.2d 103 (1981). Consequently we are entitled to review *de novo* the district court's determination that Kinsey's speech is not entitled to constitutional protection. *Kirkland v. Northside Indep. School Dist.*, 890 F.2d 794, 798 (5th Cir.1989). This court has a constitutional obligation to assure that the record supports the district court's conclusion. Therefore, "we are compelled to examine for ourselves the statements in issue and the circumstances under which they [were] made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect."[1]

III. Public Concern

Whether an employee's speech addresses a matter of public concern must be determined by the "content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48, 103 S.Ct. at 1690 (footnote omitted); *Moore v. City of Kilgore*, 877 F.2d 364, 369 (5th Cir.1989), *cert. denied*, ___ U.S. ___, 110 S.Ct.

---

[1] *Rankin*, 483 U.S. at 386, 107 S.Ct. at 2897 (quoting *Connick*, 461 U.S. at 150 n. 10, 103 S.Ct. at 1692 n. 10) Therefore this court cannot "avoid making an independent constitutional judgment on the facts of the case." *Connick*, 461 U.S. at 150 n. 10, 103 S.Ct. at 1692 n. 10 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 190, 84 S.Ct. 1676, 1679, 12 L.Ed.2d 793 (1964)).

562, 107 L.Ed.2d 557 (1989); *Terrell v. University of Tex. Sys. Police*, 792 F.2d 1360, 1362 n. 2 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987). "The courts will not interfere with personnel decisions 'when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest.' " *Page*, 837 F.2d at 237 (quoting *Connick*, 461 U.S. at 147, 103 S.Ct. at 1690). In other words, when speech is purely private, such as a dispute over an employee's job performance, the employee enjoys no First Amendment protection of that speech. *Connick*, 461 U.S. at 146, 103 S.Ct. at 1690; *Day v. South Park Ind. School Dist.*, 768 F.2d 696, 700 (5th Cir.1985), *cert. denied*, 474 U.S. 1101, 106 S.Ct. 883, 88 L.Ed.2d 918 (1986).

The required inquiry into the "content, form and context" of a given statement necessitates a case-by-case analysis. Consequently, courts have consistently avoided precisely defining the concept of "public concern."[2] Courts have used various criteria in their attempt to grasp this slippery concept. In *Connick*, the court attempted to define "public concern" as "any matter of political, social, or other concern to the community." *Id.* at 146, 103 S.Ct. at 1690. Perhaps the only reasoned approach to this analysis is to determine what factors this court has used in the past to determine whether speech addresses a matter of public concern.[3] In *Davis v. West*

---

[2] *Thompson v. City of Starkville*, 901 F.2d 456, 461 (5th Cir.1990) ("[T]he definition of the term 'public concern' is far from clearcut.")

[3] Another method courts have used in attempting to bring order to this analysis is to categorize the decided cases to

(Continued on following page)

Community Hosp., this court considered whether the communication in question related to the policies of the

---

(Continued from previous page)

determine what has and has not been held to be a matter of public concern. For example, protesting the President's policies by commenting favorably upon an assassination attempt against his life is a matter of public concern meriting protection. *Rankin*, 483 U.S. at 386-87, 107 S.Ct. at 2897-98. Similarly, a public school teacher may publicly protest the school board's allocation of resources between athletics and academics. *Pickering*, 391 U.S. at 571, 88 S.Ct. at 1736, or may privately protest a school's alleged racially discriminatory policy in a conversation with the principal, without fear of retaliatory dismissal, *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 415-16, 99 S.Ct. 693, 696-97, 58 L.Ed.2d 619 (1979).

The Fifth Circuit has held that public employees raise matters of "public concern" if they criticize a court's treatment of traffic appeals, *Scott v. Flowers*, 910 F.2d 201 (5th Cir.1990), or the conduct of police officers, *Thompson v. City of Starkville*, 901 F.2d 456 (5th Cir.1990). In addition, allegations regarding inadequate manpower at the local fire department are a matter of public concern, *Moore v. City of Kilgore*, 877 F.2d 364 (5th Cir.), *cert. denied*, ___ U.S. ___ 110 S.Ct. 562, 107 L.Ed.2d 557 (1989), as are allegations regarding preferential grading of athletes and grades given in exchange for sexual favors, *Coats v. Pierre*, 890 F.2d 728 (5th Cir.1989). Moreover, a state mental health facility social worker's statements to patients regarding their right to legal counsel are a matter of public concern, *Price v. Brittain*, 874 F.2d 252 (5th Cir.1989), as are comments criticizing the quality of nursing care given to a group of people, including inmates, *Frazier v. King*, 873 F.2d 820, 825 (5th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 502, 107 L.Ed.2d 504 (1989).

In contrast, public employees raise matters of "private concern" if they criticize the morale problems or transfer policies at the district attorney's office. *Connick*, 461 U.S. at 148-49, 103 S.Ct. at 1690-91. A teacher's failure to use proper administrative channels to approve a supplemental reading list also

(Continued on following page)

institution or to the actions of other employees and whether the communication was in-house when determining whether the communication involved a "public concern." 755 F.2d 455, 461 (5th Cir.1985). The following year, this court considered such factors as whether the employee tried to communicate to the public and whether people outside the workplace were debating the subject of the speech. *Gomez v. Texas Dept. of Mental Health*, 794 F.2d 1018, 1021-22 (5th Cir.1986).

In this case, Kinsey was stating his opinions about a political election which concerned the citizens of Salado. In addition, this speech was addressed to people outside the workplace. Although his position as superintendent was arguably at stake in the election, his speech did not

---

(Continued from previous page)

raises matters of private concern. *Kirkland v. Northside Indep. School Dist.*, 890 F.2d 794 (5th Cir.1989). In addition, grievances filed by employees alleging favoritism or criticizing the performance of co-employees and supervisors raise matters of a private concern. *Moore v. Mississippi Valley State Univ.*, 871 F.2d 545 (5th Cir.1989); *Terrell v. University of Tex. Sys. Police*, 792 F.2d 1360 (5th Cir.1986), *cert. denied*, 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987). Moreover, an employee's protestations regarding an employer's unfavorable job evaluation raise a matter of private concern. *Day v. South Park Ind. School Dist.*, 768 F.2d 696 (5th Cir.1985), *cert. denied*, 474 U.S. 1101, 106 S.Ct. 883, 88 L.Ed.2d 918 (1986).

After engaging in this type of analysis, courts try to determine whether their facts are more analogous to the cases where the speech was held to address a public concern or a private concern. Although it is somewhat helpful to see how courts have generally handled various factually distinct situations, these cases are not factually similar enough to indicate whether Kinsey's speech addressed public or private concerns.

solely relate to an employee grievance or school policy. Rather, his speech addressed a publicly debated issue regarding school board elections. Kinsey attempted to communicate his ideas on this subject through private and public discussions with the citizens of Salado, as well as through a letter published in a local newspaper.

These statements occurred in the context of a hotly contested public election. The community of Salado is a small, unincorporated city with a small school system. As we noted in *Burris v. Willis Indep. School Dist., Inc.*, 713 F.2d 1087, 1095 (5th Cir. 1983), "In such small communities, issues affecting local school matters can easily become issues of great public importance." The record indicates that Kinsey, himself, had apparently become an issue in the election. A vote for the Berry Slate was essentially viewed as a vote for Kinsey. Kinsey and the Berry Slate supported leaving the daily operation of the school to the school administrators while those opposing the Berry Slate favored a more active role for the Board in the daily running of the schools. If Kinsey was indeed an issue in the campaign, his statements concerning the election were certainly of public interest. Kinsey's statements, made in the context of a public election, are the type of political speech which has been referred to as "the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 75, 85 S.Ct. 209, 216, 13 L.Ed.2d 125 (1964).

The School District argues that an inquiry into Kinsey's motive is central to a determination whether his speech addressed a "public concern." The district court apparently adopted this reasoning, finding that Kinsey's speech during the Board elections was purely motivated

by his concern for his job. Record at 703. Kinsey himself admitted that his concern for his job partly motivated his involvement in the election process. However, by focusing solely on an employee's motivation, a court does not fully analyze the content, form, and context of the speech, as the Supreme Court required in *Connick*.[4] In *Connick*, the Supreme Court recognized that an element of personal interest does not immediately remove the speech from the realm of "public concern."[5]

This court has expressly recognized that an employee's speech may contain a mixture of public and personal concerns. For example, in *Gonzalez v. Benavides*,

---

[4] *See Kurtz v. Vickrey*, 855 F.2d 723, 727 (11th Cir.1988) (focusing solely on employee's motive overlooks the content of the speech which "is undoubtedly a material concern."); *Rode v. Dellarciprete*, 845 F.2d 1195, 1201-02 (3d Cir.1988) (inappropriate for court to focus on motive "when a public employee participates in an interview sought by a news reporter on a matter of public concern. The employee is engaged in the exercise of a first amendment right to freedom of speech, even though the employee may have a personal stake in the substance of the interview.")

[5] In *Connick*, the court held that an employee questionnaire, distributed internally by an aggrieved employee, which primarily addressed internal matters of a personal concern, such as office morale, an office transfer policy and employee confidence in supervisors, nevertheless fell within the rubric of matters of public concern because one question dealt with matters of a public concern. One question on the survey dealt with whether employees ever felt pressured to work in political campaigns. The Court held this was a public concern because "there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service" *Connick*, 461 U.S. at 149, 103 S.Ct. at 1691.

774 F.2d 1295 (5th Cir.1985), *cert. denied*, 475 U.S. 1140, 106 S.Ct. 1789, 90 L.Ed.2d 335 (1986), this court observed:

> Gonzalez's disagreement with the commissioners indisputably was a matter of concern to Gonzalez as an employee. We do not read *Connick*, however, to exclude the possibility that an issue of private concern to the employee may also be an issue of public concern. Indeed, the teacher dress code in *Mount Healthy*, and the school bonds under discussion in *Pickering*, appear to have been "mixed" issues of both public and private concern. . . . We are persuaded that Gonzalez raised such a mixed issue.

Id. at 1300-01. *See also Thompson v. City of Starkville*, 901 F.2d 456, 465 (5th Cir.1990) ("The existence of an element of personal interest on the part of an employee in his speech does not, however, dictate a finding that the employee's speech does not communicate on a matter of public concern."; *Browner*, 855 F.2d at 192 ("[It] is clear that only a portion of a communication need address a matter of public concern.")

In sum, our perusal of the entire record leads us to believe that although Kinsey undoubtedly had a personal interest in the outcome of the school board election, his motive is not the controlling issue. Kinsey's statements made in the context of a hotly contested political campaign, supporting one slate of candidates, were primarily made as a citizen addressing a matter of public concern, not as an employee addressing purely private issues. Therefore, the district court incorrectly held that Kinsey's speech addressed matters of purely private concern.

IV. Pickering Balancing

Having determined that Kinsey's speech passed the threshold question of "public concern," we must now apply the *Pickering* balancing analysis. The *Pickering* balancing analysis requires us to weigh Kinsey's interest in discussing matters of public concern, together with the public's interest in hearing such discussion, against the state's interest as employer in efficiently providing public services. *Pickering*, 391 U.S. at 568, 571-72, 88 S.Ct. at 1734.

Although the *Pickering* Court recognized that no general standard exists for measuring employee conduct, the Supreme Court did attempt to adumbrate some general lines of analysis in these types of cases. *Pickering*, 391 U.S. at 568-73, 88 S.Ct. at 1734-37. *Pickering* and its progeny have listed several specific examples of legitimate employer concerns: discipline and harmony in the workplace, confidentiality, freedom to discharge an employee whose speech has impeded the proper performance of her duties or whose speech is so lacking in foundation as to call his competence into question, protection of close working relationships that require loyalty and confidence, the abstract or personal nature of the statements, and the time, place and manner of the speech. *Id. See also Gonzalez*, 774 F.2d at 1300. Not all of these factors are relevant to any one situation.[6]

---

[6] We do not suggest that the factors enumerated in *Pickering* and its progeny are meant to be exclusive of all others. Each individual set of facts may suggest new avenues of analysis.

A relevant consideration to our analysis in this case is whether Kinsey's statements were critical of a person "with whom [he] would normally be in contact in the course of his daily work" such that the criticism might impede "discipline . . . or harmony among co-workers." *Pickering*, 391 U.S. at 569-70, 88 S.Ct. at 1735. The record indicates that Kinsey refrained from personal criticism of the candidates he opposed. Rather, his statements during the election simply reflected his high regard for the Berry Slate. *Cf. McBee v. Jim Hogg County*, 730 F.2d 1009, 1017 (5th Cir.1984) ("[I]t is one thing to work with a subordinate who has expressed a reasoned preference for another superior and quite another to have forced on one's organization an individual who has blackguarded one's honesty and ability up and down the county.")

Another relevant consideration is whether Kinsey was in a confidential relationship to the School Board. The district court held that "Kinsey, as superintendent, was in a close confidential relationship to the board of trustees [such that if] the relationship between the two are [antagonistic], the Salado Independent School District's operation may be adversely affected." Record at 702. Unquestionably, a school superintendent and his school board stand in a close and confidential relationship. The school board employs the superintendent, who in turn acts as the educational leader and administrative manager of the school district. TEX.EDUC.CODE ANN. §§ 13.351, 23.26, 23.28 (Vernon 1987 and Supp.1990). Since the school board can only act by a majority vote of its membership at duly called meeting, it is totally dependent upon the superintendent to effectuate its policies and decisions.

Nevertheless, we must weigh the government's interest in the loyalty of the superintendent against the superintendent's speech rights. "That weighing is required because we do not decide that all speech by persons in such relationships is unprotected. Rather, the speech must be weighed against its impact upon the relationship and that relationship's role in the elected official's discharge of his duties." *Gonzalez*, 712 F.2d 142, 150 (5th Cir.1983), *aff'd*, 774 F.2d 1295 (5th Cir.1985), *cert. denied*, 475 U.S. 1140, 106 S.Ct. 1789, 90 L.Ed.2d 335 (1986).

The School Board fails to prove that Kinsey's speech had any deleterious effects on discipline, working relationships, Kinsey's performance, or the regular operations of the school district. Although the School Board argues that no actual disruption is required under *Connick*, they fail to note that *Connick* allows terminations based on merely a reasonable apprehension of disruption only when the employee's speech addresses a public concern in only "a most limited sense." *Connick*, 461 U.S. at 154, 103 S.Ct. at 1693-94. The *Connick* Court cautioned that a stronger showing may be necessary when the speech more directly implicates public concern.

In this case Kinsey's speech during the school board election was at the heart of First Amendment protection. As the Supreme Court has stated, absent exceptional circumstances, "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964). Involvement in the political process is central to the meaning of the First Amendment. As the *Connick* Court emphasized, the First Amendment "was fashioned to assure the unfettered interchange of ideas for the

bringing about of political and social changes desired by the people." *Connick*, 461 U.S. at 146, 103 S.Ct. at 1689.

Although the position of superintendent requires a close working relationship with the school board, in this case the School Board failed to prove that Kinsey's public statements adversely affected his working relationship with the School Board. Undoubtedly the relationship between Kinsey and the School Board deteriorated to the point that the School Board felt it was necessary to relieve Kinsey of his position, but the record does not reflect, nor does the School District apparently assert, that this deterioration was caused by Kinsey's speech during the election.[7] Nor did Kinsey's participation in the school board election amount to public disavowal of the school board's authority over him. After the election, Kinsey publicly promised to support the Board. Although several members of the new majority of the Board claimed Kinsey failed to comply with the spirit of the directives drafted by the Board following the election, the record is devoid of specific examples.

In this case, Kinsey's constitutional right to free speech clearly outweighs the School Board's interest in having a superintendent subject to a concept of loyalty which requires that he be forbidden to express his views on critical issues involving the schools. Voting and the right to speak freely on the issues debated in an election are entwined and symbiotically related. We cannot have an educated electorate if that electorate is deprived of the

---

[7] The School District repeatedly asserts that the Board's relationship with Kinsey deteriorated due to Kinsey's actions prior to the election, not due to his conduct during the election.

voice of those most intimately acquainted with the issues. A school superintendent possesses unique experience, judgment and knowledge regarding the operation of a school district. To unequivocally forbid such a person from participating in the election of school board members deprives that person his right to freedom of speech, and denies the electorate of access to his unique point of view.[8] Freedom of speech and the voting franchise are precious rights and we should deny them to few, if any.[9]

V. Excessive Damages?

The School Board argues that the $250,000 the jury awarded Kinsey as damages for his "suffered mental anguish or emotional distress, loss of reputation, personal expenses, and other monetary harms" is excessive. The

---

[8] *Cf. Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (College professor speaking before Texas legislature in favor of a proposal to elevate all junior colleges to four-year institutions was a member of the public who, by virtue of his position, was likely to have special insight into matter of public concern.)

[9] The School District argues a finding for Kinsey essentially assures a public employee of perpetual tenure by providing him the opportunity to challenge every employment decision on the basis of his speech or political activity. This argument overlooks the *Mt. Healthy* but-for analys . *Mt. Healthy* requires the fact-finder to determine whether the employer would have suspended or fired the employee regardless of the protected speech. According to the Supreme Court, this inquiry is essential because the courts should not place an employee in a better position as a result of his protected speech than he would have otherwise occupied. *Mt. Healthy*, 429 U.S. at 285-86, 97 S.Ct. at 575. This precise factual issue was submitted to the jury in the instant case and the jury found for Kinsey.

School Board argues that we should uphold the Judgment Notwithstanding the Verdict on this ground, or alternatively hold that the district court abused its discretion in conditionally denying a new trial because the verdict was contrary to the clear weight of the evidence.[10]

In evaluating whether the jury's award is excessive, we are mindful that assessment of damages is for the trier of fact, and "in this area the appellate court should step lightly or not at all." *In re Air Crash Disaster Near New Orleans*, 767 F.2d 1151, 1155 (5th Cir.1985). It is well settled that a jury's damages award should not be disturbed

> except on the "the strongest of showings." The jury's award is not to be disturbed unless it is entirely disproportionate to the injury sustained. We have expressed the extent of distortion that warrants intervention by requiring such awards to be so large as to "shock the judicial conscience," "so gross or inordinately large as to be contrary to right reason," so exaggerated as to indicate "bias, passion, prejudice, corruption, or other improper motive," or as

---

[10] The School Board also argues that we should sustain the Judgment Notwithstanding the Verdict because Kinsey's speech was not a substantial motivating factor in the school district's decision to relieve him, and/or the School District would have decided to suspend Kinsey even in the absence of his speech. *See Mt. Healthy*, 429 U.S. at 285-86, 97 S.Ct. at 575. These issues are questions of fact. When faced with conflicting credible evidence, it was within the jury's province to resolve the conflict in favor of Kinsey. *See Brown v. Bullard Indep. School Dist.*, 640 F.2d 651 (5th Cir.1981).

> "clearly exceed[ing] that amount that *any* reasonable man could feel the claimant is entitled to." (Footnotes omitted.)

Caldarera v. Eastern Airlines, Inc., 705 F.2d 778, 784 (5th Cir.1983); *see also Marks v. Pan American World Airways, Inc.*, 785 F.2d 539, 540-41 (5th Cir.1986).

We are especially hesitant to disturb an award where, as here, the trial judge has upheld verdict. *Shows v. Jamison Bedding, Inc.* 671 F.2d 927, 935 (5th Cir. 1982). In the case at bar, the district court specifically held that if it was reversed on its legal conclusions, the verdict of the jury should stand. Record at 701. "The jury's assessment of damages is even more weighted against appellate reconsideration, especially when. . . . the trial judge has approved it." *Caldarera*, 705 F.2d at 783-84; *see also Haley v. Pan American World Airways, Inc.*, 746 F.2d 311, 317 (5th Cir. 1984); *Shows*, 671 F.2d at 934.

Damages for violations of constitutional rights are determined in accordance with principles derived from the common law of torts. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305, 106 S.Ct. 2537, 2543, 91 L.Ed.2d 249 (1986). Damages in tort cases are designed to provide "*compensation* for the injury caused to plaintiff by defendant's breach of duty." *Carey v. Piphus*, 435 U.S. 247, 255, 98 S.Ct. 1042, 1047, 55 L.Ed.2d 252 (1978). Compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as "impairment of reputation . . . , personal humiliation, and mental anguish and suffering." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S.Ct. 2997, 3012, 41 L.Ed.2d 789 (1974).

Compensatory damages may not be presumed, but must be proven. *Carey*, 435 U.S. at 263-64, 98 S.Ct. at 1052-53. Kinsey testified at trial as to the anguish, embarrassment, anxiety, and loss of reputation he has suffered, and the jury believed him. A plaintiff's testimony alone has been held to be sufficient proof of such damages. *See Chalmers v. City of Los Angeles*, 762 F.2d 753 (9th Cir. 1985).

We have been cited to no case, nor have we discovered any case, which sheds any light on how high an award must be to be excessive. Courts have frequently upheld verdicts well in excess of this verdict for pain and suffering, both mental and physical. *See Shows*, 671 F.2d at 934. In this case, ample proof was presented at trial of actual injury to Kinsey, both in his effective discharge and by the damage done to his reputation and to his professional career as a superintendent. Therefore, the award of damages is affirmed.

CONCLUSION

Kinsey's public and private conversations with the residents of Salado during the 1988 school board elections addressed matters of public concern. Kinsey undoubtedly had a personal interest in the outcome of the school board election. However, in the context of a hotly contested political campaign, these statements were made primarily as a citizen addressing a matter of public concern and not as an employee addressing purely private issues. In addition, in this case Kinsey's right to free speech outweighs the School Board's interest as an employer in efficiently providing public services. Finally, the damages awarded by the jury to Kinsey were not so inordinately large as to

shock the judicial conscience. We have carefully considered the School District's other points of error and we find them without merit. Therefore, we REVERSE.

GEE, Circuit Judge, dissenting:

Today the Court holds that the highest executive in a public school system can, by deliberately injecting himself into and making his policy views a central issue in a school board election, so entrench himself in office that he cannot be discharged even though the voters rejected both the views that he espoused and his surrogates, the candidates whom he sought to elect.[1] Thus, although the school district constituency could vote out Dr. Kinsey's supporters who championed his policies, it could not rid itself of Dr. Kinsey who, like the celebrated Vicar of Bray,[2] by an easy change of views is to maintain his position despite – indeed, precisely because of – his political meddling. Such a message, that self-conferred tenure waits only upon involving oneself in the political campaigns of

---

[1] As the majority notes, "A vote for Berry Slate was essentially viewed as a vote for Kinsey. Kinsey and the Berry Slate supported leaving the daily operation of the school to the school administrators. . . . " (Slip op. at 619, at ___). Of these latter, of course, Kinsey was the chief.

[2] It will be recalled that the 16th century Vicar managed to retain his endowed living during all religious changes of the reigns of Henry VIII, Edward VI, Mary and Elizabeth I, a feat that gave rise to a popular ballad:

> And this is the law I will maintain
> Until my dying day, Sir,
> That whatsoever king shall reign
> I'll still be the Vicar of Bray, sir.

one's elected superiors, will not likely be lost on policymaking public servants or those engaged in close working relationships with their public employers.

No lengthy writing is called for in dissent, it seems to me, for I do not think that this can be the law; to state the proposition is to refute it. If public servants such as Dr. Kinsey, whom the majority concedes "unquestionably" stand in a close and confidential relationship to the school board (Slip op. at 621, at ___), have only to enter the fray on one side or the other of board elections in order to lock down their positions for good and all then, and just insofar, the Constitution truly has become a suicide pact. Long ago, in reliance on Supreme Court authority, we held the contrary:

> In *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) and *Branti v. Finkel*, 445 U.S. 507, 100, S.Ct. 1287, 63 L.Ed.2d 574 (1980), the Court found that the First Amendment protected employees from discharge because of their political affiliation but excluded from this protection holders of certain "policy-level" positions. While the *Branti* Court eschewed this categorical inquiry, it continued to acknowledge that political affiliation may be a sufficient proxy of necessary loyalty as to be permissibly considered for certain types of "positions."
>
> . . .
>
> *There is a governmental interest in securing those unique relationships between certain high level executives and the elected officials at whose grace they serve.* For this narrow band of relationships, refusing to grant First Amendment found tenure would seem to take away little freedom not

> already lost in accepting the appointment itself at least when the appointive job has the sweep of authority and discretion as to be central to the elected official's duty. The holder of such a position can hardly have any reasonable expectation but that his policy choices must publicly fall within the protective license issued by his appointing officer. His selection presumably included that supposition. To say that loss of that job is the price for his public declaration chills little. For us it follows that disruption of the relationship between an appointing authority and a holder of such a senior position may be weighed in the assaying of his First Amendment right to escape termination for a public disavowal of his appointing authority's power of supervision. But we say no more than that such governmental interest are relevant to the First Amendment inquiry into the context of time, place, and manner.
>
> In terms of this case the ultimate question is whether that interest was present here and was such that Gonzalez's First Amendment protection did not include job security as executive director of the Community Action Agency.

Gonzalez v. Benavides, 712 F.2d 142, 147-48 (5th Cir.1983) (emphasis added).

And again, the Court, sitting en banc, reiterated the principles governing today's case:

> On the one hand, the court should consider to what degree the deputies' participation in the election campaign or Mrs. McBee's actions involve "public concerns." On the other, the court should consider whether "close working

relationships are essential to fulfilling [the deputies'] public responsibilities," *Connick*, 461 U.S. at 151-52, 103 S.Ct. at 1692, 75 L.Ed.2d at 723. We caution that the "closeness" of a working relationship as it affects job performance is not to be gauged merely by the size of the office or the number of employees. Rather, it is a function of the particular "public responsibility" being carried out. "Close working relationships" may be less relevant to the effectiveness of a five-man one-room Motor Vehicle Bureau than they are to the effectiveness of a 50-officer police precinct, for example. Should the court find "close working relationships" "essential," it must then determine whether the particular speech sufficiently disrupted the working relationship as to prevent effective performance requiring a stronger showing of disruption as the employees' speech moves closer to core "public concerns." *Id.*

Relevant to the determination of disruptive effect is the time, place and manner of the political activity. The *Connick* court, for example, noted that the employee in that case used work time and work space, commenting that employee speech that did not do so "might lead to a different conclusion." 461 U.S. at 153, n. 13, 103 S.Ct. at 1693, n. 13, 75 L.Ed.2d at 724, n. 13.

Finally, the court should consider whether, taken in context, the particular activity could be considered sufficiently hostile, abusive or insubordinate as to disrupt significantly the continued operation of the office. 461 U.S. at 153-54, 103 S.Ct. at 1693, 75 L.Ed.2d at 724. In this connection, to the extent that the district court's analysis suggests that as a matter of law it will

> never be relevant to First Amendment inquiry whether the speech involved constitutes personal as distinguished from party political support, it stands corrected by *Connick* and *Gonzalez*. *Cf. Gonzalez*, 712 F.2d at 148 (even where no intimate working relationship exists, an appointed senior official's public disavowal of the authority of his superiors may constitute such disruption as to outweigh his First Amendment right in that speech).

McBee v. Jim Hogg County, Tex., 730 F.2d 1009, 1016-17 (5th Cir.1984).

The record indicates, and indeed it is common knowledge, that a Texas school superintendent such as Dr. Kinsey is the principal executive of the school district, standing in like relationship to school board members as does the president of a business corporation to his board of directors. In addition, while molar policy is in great degree for the board, molecular policy is his. The relationship is all but symbiotic, and a ruder violation of it than public campaigning by the superintendent for one faction of the board against another can scarcely be imagined.

If the majority's eloquent opinion is correct, however, taking sides in the next election should be a new superintendent's first step if he likes his job: barring a truly incandescent ingratitude, if those for whom he campaigned prevail, his job is safe; and if they do not, their successful opponents, whose election he opposed, cannot discharge him. With all deference to my brethren, I cannot believe that such is the law. I therefore respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

DR. NOLAN L. KINSEY, Plaintiff, v. SALADO INDEPENDENT SCHOOL DISTRICT, ET AL., Defendants.	)	CIVIL ACTION NO. W-88-CA-329 (FILED JUL 5, 1989)

ORDER

On this day the Court considers Defendant's Motion for Judgment Notwithstanding the Verdict or in the Alternative for New Trial. Upon careful consideration, the Court is of the opinion that Defendant's motion is meritorious and that a Judgment Notwithstanding the Verdict should be granted.

Plaintiff first claims that Defendant did not properly preserve its motion for judgment notwithstanding the verdict because it failed to raise the same specific grounds as in its motion for directed verdict. The Court finds Plaintiff's contentions are without merit.

While it is true that a motion for judgment notwithstanding the verdict may not assert a new ground not raised in a motion for directed verdict, the rule for stating grounds in a motion for directed verdict is quite liberal. Technical precision is not required, but the movant should state with sufficient certainty to apprise the opposing party and the Court of the movant's position. 9

Wright and Miller, Federal Practice and Procedure Sections 2533, 2537 at 579-582, 596-97 (1971).

The Court finds that Defendant's motion for judgment notwithstanding the verdict is not precluded by variances with the motion for directed verdict. Defendant filed a written motion and orally stated its points. The record indicates that Defendant's counsel stated with sufficient certainty to apprise the Plaintiff and the Court of Defendant's position that there was little or no evidence that Plaintiff's conduct was protected by the First Amendment.

The next issue is whether Plaintiff's conduct was a constitutionally protected activity as a matter of law. An employee's speech is protected, if it is "speech concerning public affairs." *Connick v. Meyers* 461 U.S. 138, 145 (1983). However, if the employee comments on matters of a purely personal nature, the employee's discharge is not susceptible to first amendment review "absent the most unusual circumstances." *Id.* at 147. The Court must balance the employee's speech against the Government's interest in the promotion of integrity and efficiency in the discharge of official duties and in maintenance of proper discipline in public service. *Id.* at 150-51. In its decision making process, the Court should consider, among other things, whether the speech impeded his ability to perform his job; time, manner, and place of the speech; and whether close working relationships with superiors were disrupted. *Id.* at 151-53; *Gonzalez v. Benevides,* 774 F.2d 1295, 1300 (5th.Cir. 1985).

These inquiries are purely a question of law which the Court must resolve independently upon its own

assessment of the evidence. *Connick*, 461 U.S. at 148 n. 7, 150 n. 10. The Court now focuses on those issues.

The evidence showed that Plaintiff became involved in the 1988 school election primarily for job security reasons. Kinsey supported candidates whom he knew favored his superintendency. Kinsey's supporters were not elected. After that, the friction between the school board, namely Defendant's Barrentine, Hagler and Hodge culminated in the School Board's vote to relieve Kinsey of his duties with full pay and benefits.

The Court first finds that Plaintiff's speech was primarily of a private concern: job security. In fact, Kinsey was an issue during the school board elections. It was virtually undisputed that a vote for the Berry, Schental, Fulford slate equaled a vote "for" Kinsey, and a vote for the Hagler, Hodge, Bartlett slate was a vote "against" him.

The Court finds that Plaintiff's speech was of a purely private nature and the jury should not have been presented the issue of Plaintiff's speech at trial.

The simple fact is that a substantial number of the school district's taxpayers become unhappy with Kinsey; his retention as superintendent became the issue in the election; a large majority voted, in effect, to terminate him as superintendent; and the speech he claims was protected was only voiced in an attempt to protect his job. A judicial determination that the Defendant should now be liable to Kinsey in damages would have a chilling effect on free elections of the Salado Independent School District. This valuable right strongly outweighs any rights of speech Kinsey may have had in this controversy.

Even if Kinsey's speech could have been characterized as one of "public concern" the Court finds that the issue of retaliation due to his speech should not have been a jury issue.

Kinsey, as superintendent, was in a close confidential relationship to the board of trustees. If the relationship between the two are antogonistic [sic], the Salado Independent School District's operation may be adversely affected. The record is clear that Kinsey's relationship with the Board worsened after the School Board election. This is illustrated by the parties' inability to cooperatively work out school directives which eventually led to appearances of legal counsel.

The Court finds that such disruptions undermined the effectivensss [sic] of the School Board. Kinsey's right to speech or political opposition to a majority of the officials elected by the community to, govern him is outweighed by the board's legitimate interest in having a superintendent with loyalty to the new board's policies and directives. Therefore,

IT IS ORDERED that Defendant's Motion for Judgment Notwithstanding the Verdict, or In the Alternative for New Trial is GRANTED.

IT IS FURTHER ORDERED that Judgment be entered for Defendant.

IT IS FURTHER ORDERED that Defendant's alternative motion for new trial is DENIED. In the event this Court is in error in the legal conclusions reached herein, the verdict of the jury should stand. This ruling will take

effect only in the event the Court's Order granting Defendant's Motion for judgment notwithstanding the verdict is reversed on appeal.

SIGNED this 5th day of July, 1989.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

DR. NOLAN L. KINSEY, Plaintiff, v. SALADO INDEPENDENT SCHOOL DISTRICT, ET AL., Defendants.	)	CIVIL ACTION NO. W-88-CA-329 (FILED JUL 5 1989)

JUDGMENT

In accordance with the Court's Order granting Defendant's Motion for a Judgment Notwithstanding the Verdict, the Court enters its Judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff, Dr. Nolan L. Kinsey, take nothing against Defendants, Salado Independent School District, Salado Independent School District Board of Trustees, Joe O. Barrentine, Claude Hodge, Glenn Hagler and Gary Bartlett, costs of court to be taxed against Plaintiff.

SIGNED this 5th day of July, 1989.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

DR. NOLAN L. KINSEY, Plaintiff,	)	
v.	)	CIVIL ACTION
SALADO INDEPENDENT SCHOOL DISTRICT, ET AL., Defendants.	)	NO. W-88-CA-329 (FILED APR 27 1989)

ORDER

On this day the Court considers Defendants' motion for summary judgment. The Court finds the motion should be partially granted.

I. Introduction

Plaintiff, Nolan L. Kinsey, was the superintendent of the Salado Independent School District from 1981 until September 10, 1988, when he was permanently relieved of his duties with full pay and benefits. Thereafter, Plaintiff commenced this lawsuit in October, 1988 against the Salado Independent School District ("SISD"), the SISD Board of Trustees, ("Board"), and Joe O. Barrentine, Claude Hodge, Glenn Hagler and Gary Bartlett, both individually and in their official capacity as school board members.

Plaintiff alleges that defendants violated his rights under the Due Process Clause of the United States Constitution in the way in which they proceeded to relieve him

of his duties. Plaintiff further urges that his political associations and exercise of speech were a substantial or motivating factor in his being relieved and that his rights under the Fifth Amendment of the United States Constitution were violated. Finally, Plaintiff asserts various state law claims.

1. Due Process

Defendants assert that Plaintiff does not have a federal due process complaint because he was employed under the term contract provisions of the Texas Education Code and because he is continuing to be compensated for his job.

This Court must decide whether Kinsey had a constitutionally protected property interest by reference to state law. *Cleveland Board of Education v. Loudermilk,* 470 U.S. 352, 105 S.Ct. 1487, 1491 (1985); *Board of Regents v. Roth,* 408 U.S. 564 (1972). A plaintiff employed under the term contract provisions of Section 12.19 of the Texas Education Code has no property right in his or her employment beyond the expiration of the contract term. *Burris v. Willis Independent School District, Inc.,* 713 F.2d 1087 (5th Cir. 1983); *Wells v. Hico Independent School District,* 736 F.2d 243 (5th Cir. 1984).

However, whether a plaintiff has a property right to actively engage in and execute the duties of his or her employment is another question. Defendants primarily rely on two cases, *Cannon v . Beckville Independent School District,* 709 F.2d 9 (5th Cir. 1983) and *Royster v. Board of Trustees,* 774 F.2d 618 (4th Cir. 1985), *cert. denied* 106 S.Ct.

1638 (1986). The facts and holding in *Cannon* are inapposite to the instant case. In *Cannon*, the Plaintiff, a superintendent was terminated from his job. The Court found that Plaintiff lacked any property interest because there was no written contract but merely the board approval to extend Cannon's contract, and that there was no more than a general offer of employment and a willingness to finalize the contract in writing with acceptable terms. *Cannon*, 709 F.2d at 10, 11. The Fifth Circuit did not explicitly hold that a superintendent, under a valid contract had a right to due process.

The second case, *Royster*, involved almost an identical set of facts as the instant case. The Court held that the superintendent only had a right to be fully compensated and not a right to continue to occupy the office of superintendent. *Royster*, 774 F.2d 618, 621 (4th Cir. 1985).

Plaintiff argues that these two cases are no longer applicable because of the United States Supreme Court's implicit holding in *Community School District v. Stachura* [sic], ___ U.S. ___, 106 S.Ct. 2537 (1988). In *Stachura*, a school teacher sued alleging the suspension deprived him of liberty and property without due process, and the jury found in his favor on both issues. The Supreme Court granted certiorai [sic] to determine the propriety of the District Court's instructions that authorized compensatory and punitive damages and damages for deprivation of any constitutional right. *Stachura*, 106 S.Ct. at 2541. The Court reversed and remanded to determine the issue of compensatory damages. Plaintiff urges that this Court interpret the Supreme Court's holding that a property right does exist.

This Court does not interpret *Stachura* in this manner. The only issue of the Court was damages, nothing more and nothing less. The rest is only dicta and non-binding on this Court.

Notably, the Fifth Circuit has spoken on this issue since the Supreme Court's opinion in *Stachura*. In *Jett v. Dallas Independent School District*, 798 F.2d 748 (5th Cir. 1986), the Court stated:

> When a public employee has a legitimate entitlement to his employment, the due process clause may protect as "property" no more than the status of being an employee of the governmental employer in question together with the economic fruits that accompany the position. Although the governmental employer may specifically create a property interest in a noneconomic benefit – such as a particular work assignment – a property interest in employment generally does not create due process property protection for such benefits. *See Findeisen v. North East Independent School District*, 749 F.2d 234, 240-42 & n. 3 (5th Cir. 1984) (Garwood, J., concurring), *cert. denied*, ___ U.S. ___, 105 S.Ct. 2657, 86 L.Ed.2d 274 (1985). Of course, a significant loss of responsibilities may result in a deprivation of a liberty interest when the plaintiff has been stigmatized. *See Kelleher v. Flawn*, 761 F.2d 1079, 1087 (5th Cir. 1985). Moreover, an employee's loss of noneconomic benefits may support an action for breach of contract. However, not every breach of an employment contract on the part of the government amounts to a deprivation of a property interest. *See Casey v. Depetrillo*, 697 F.2d 22 (1st Cir. 1983). (per curiam); *Vail v. Board of Education of Parish Union*

School District No. 95, 706 F.2d 1435, 1449 (7th Cir. 1983) (Posner, J., dissenting), *aff'd by an equally divided Court*, 466 U.S. 377, 104 S.Ct. 2144, 80 L.Ed.2d 377 (1984).

Jett, 798 F.2d at 754 n. 3.

Based on the foregoing, the Court holds that no deprivation of due process occurred since Plaintiff is being offered full compensation.

Moreover, since Plaintiff has not been suspended without pay, there was no right to a determination [sic] hearing. *Everett v. Napper*, 833 F.2d 1507, 1512 (11th Cir. 1987); *see also Cleveland Board of Education v. Loudermilk*, 470 U.S. 352, 542 (1985).

2. Liberty Interest

Plaintiff has alleged a violation of his liberty interest in the form of stigmatization in and as a result of the discharge process.

The ending of an employment relationship does not alone constitute a deprivation of liberty. *Roth*, 408 U.S. at 575. To support a claim of liberty interest, a Plaintiff must show:

1) That he was stigmatized; *Kelleher v. Flawn*, 761 F.2d 1079, 1087 (5th Cir. 1987) (citing *Wells v. Doland*, 711 F.2d 670, 676 (5th Cir. 1983).

2) The stigmatization occurred in or as a result of the discharge process; *Id.*

3) The stigmatization resulted from charges made public by the employer; *Id.*

4) That he was denied a name clearing hearing. *Wells v. Dallas Independent School District*, 576 F. Supp. 497, 510 (N.D. Tex. 1983).

Plaintiff's affidavit states that directives were issued to him by the School Board at an open board meeting. These directives were drawn from complaints against the Plaintiff made by school employees in secret meetings. Plaintiff states in his affidavit that the directives were part of the process of his personal removal and, in effect, stigmatized his standing in the community.

Plaintiff has failed to show that he was denied a "subsequent denial of procedural due process to redress" the directive's stigmatization. *Wells*, 576 F. Supp. at 497. There is no evidence to support that Kinsey requested a "name clearing" hearing before filing this lawsuit, therefore, Plaintiff has failed to establish Defendants' liability under 42 U.S.C. Section 1983 for depriving him a liberty interest. *Id.*

3. First Amendment

Even though the Court has found Plaintiff is not entitled to a property or liberty interest in his job, he may still recover for actions taken by the Defendants in retaliation for the exercise of protected speech. *Gonzalez v. Benavides*, 774 F.2d 1295, 1298 (5th Cir. 1985) (citing *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274, 283-84 (1977)). An employee's speech is protected, if it is "speech concerning public affairs." *Connick v. Meyers*, 461 U.S. 138, 145 (1983). However, even speech on issues of public concern must be balanced "against the interest in 'promot[ing] efficiency and integrity in the discharge of

official duties' and in 'maintain[ing] proper discipline in public service.' " *Gonzalez*, 774 F.2d at 1300 (citations omitted). In its decision making process, the Court is to consider, among other things, whether the speech impeded his ability to perform his job; time, manner and place of the speech; and whether close working relationships with superiors were disrupted. *Connick*, 461 U.S. at 151-53.

Plaintiff's affidavit establishes that his political actions were based on differences of philosophy over the amount of Board member involvement in the day-to-day administration of the schools. There is no evidence that his actions might undermine his superior's political program. It also appears that Plaintiff's dissatisfaction was conducted in a proper, respectful manner without personal attacks on Board members. The Court finds that summary judgment on this issue must fail.

4. Fifth Amendment

To properly plead a Fifth Amendment violation, a claimant must allege and demonstrate activities of the federal government and not those of state officials or private persons. *Hankins v. Dallas Independent School District*, 698 F. Supp. 1323 (N.D. Tex. 1988). There is no allegation of federal action in this case, therefore, Plaintiff's claims under the Fifth Amendment must fail. *Id.*

5. Qualified Immunity

Each of the individual Defendants raises the defense of qualified immunity. The Supreme Court has held that

"government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as the conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The focus in such an analysis is upon the state of the law in regard to the conduct complained of at the time the official acted. *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987). The relevant inquiry is whether the law governing at the time the official acted would have given a reasonable official cause to know that his acts violated the plaintiff's rights. *Davis v. Scherer*, 468 U.S. 183 (1984). "A Plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the Defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue." *Id.* at 197. This Plaintiff has failed to make such a showing. The Court finds, as a matter of law, that the law was not clearly established as to whether an employee who is terminated is entitled to procedural due process when he is fully compensated for the balance of his contract term. Thus, summary judgment must be granted on the issue of qualified immunity.

6. 42 U.S.C. Section 1985 Claims

These claims have been withdrawn by Plaintiff.

7. Exemplary Damages

Plaintiff concedes he is not entitled to punitive damages against the SISD. Since this Court has found the individual defendants to be protected by qualified immunity, summary judgment must be granted as to the issue of exemplary damages. Therefore,

IT IS ORDERED that Defendants' motion for summary judgment be and is partially GRANTED.

IT IS FURTHER ORDERED that summary judgment be and is GRANTED as to Plaintiff's Due Process claims.

IT IS FURTHER ORDERED that summary judgment be and is GRANTED as to Plaintiff's liberty interest claims.

IT IS FURTHER ORDERED that summary judgment be and is DENIED as to Plaintiff's First Amendment claims.

IT IS FURTHER ORDERED that summary judgment be and is GRANTED as to Plaintiff's Fifth Amendment claims.

IT IS FURTHER ORDERED that summary judgment be and is GRANTED as to Plaintiff's 42 U.S.C. Section 1985 claims.

IT IS FURTHER ORDERED that summary judgment be and is GRANTED as to all Defendants sued in their individual capacities.

IT IS FURTHER ORDERED that summary judgment be and is GRANTED as to the issue of punitive damages.

SIGNED this 27th day of April, 1989.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT
JUDGE

Supreme Court, U.S.
FILED
MAY 4 1992
OFFICE OF THE CLERK

(2)

No. 91-1583

In The

Supreme Court of the United States

October Term, 1991

DR. NOLAN L. KINSEY,

Petitioner,

v.

SALADO INDEPENDENT SCHOOL DISTRICT,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM C. BEDNAR, JR.
Attorney of Record
for Respondent

Please serve:

WILLIAM C. BEDNAR, JR.
ESKEW, MUIR & BEDNAR
2050 Bank One Tower
221 West 6th Street
Austin, Texas 78701
(512) 477-6175

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

(1) Whether a Texas public school superintendent is exempt from protection of the First Amendment as a "policymaker" and "confidential employee" where his speech and political position make the extent of the school board's management authority over him the central issue in a school board election and his services are later terminated by trustees elected in opposition to his policy views.

(2) Whether a public employee's exemption from First Amendment protection as a "policymaker" or a "confidential employee" is a question of law for the court or a question of fact for the factfinder, here a jury.

(3) Whether a public school superintendent's interest in free speech is to be balanced against his school district's interest in effective and efficient government where the trustees who terminated his services deny that his speech or political position caused their decision.

TABLE OF CONTENTS

Page

Table of Contents ii

Table of Authorities iii

Counter Statement of the Case 1

Reasons for Denying the Writ 6

Conclusion and Prayer 16

TABLE OF AUTHORITIES

Page

CASES

Branti v. Finkel, 445 U.S. 507 (1980) 8, 9, 11

Connick v. Meyers, 461 U.S. 138 (1983).. 8, 9, 10, 11, 13, 14

Copp v. Unified School Dist. No. 501, 882 F.2d 1547 (10th Cir. 1989)..... 14

Elrod v. Burns, 427 U.S. 347 (1976) 8, 9, 11

Hudson v. Burke, 913 F.2d 427 (7th Cir. 1990) 12

McBee v. Jim Hogg County, Texas, 730 F.2d 1009 (1984) 11

McCollum v. Stahl, 579 F.2d 869 (4th Cir. 1978) 11

Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977) 13, 14, 15

Nekolny v. Painter, 653 F.2d 1164 (7th Cir. 1981)..... 11

Pickering v. Board of Education, 391 U.S. 563 (1968) ..*passim*

Rankin v. Independent School District No. I-3, 876 F.2d 838 (10th Cir. 1989)..... 14

Rutan v. Republican Party of Illinois, ___ U.S. ___, 110 S.Ct. 2729 (1990) 8

Saye v. St. Vrain Valley School Dist. RE1J, 785 F.2d 862 (10th Cir. 1986)..... 15

Soderbeck v. Burnett County, Wis., 752 F.2d 285 (7th Cir. 1985) 11

TABLE OF AUTHORITIES – Continued

Page

Upton v. Thompson, 930 F.2d 1209 (7th Cir. 1991)..... 12

Ware v. Unified School Dist. No. 492, 881 F.2d 906 (10th Cir. 1989)..... 14

STATUTES

19 TEX. ADMIN. CODE §§ 29-173 (West 1988 and 1992 Supp.)..... 2

TEX. EDUC. CODE ANN. § 13.351(a) (Vernon 1991)..... 2

TEX. EDUC. CODE ANN. § 23.26(b) (Vernon 1987)..... 2

TEX. EDUC. CODE ANN. § 23.28(a) (Vernon 1987)..... 2

TEX. REV. CIV. STAT. ANN. art. 6252-17a § 5(a) (Vernon Supp. 1992)..... 3

CONSTITUTION

United States Constitution, First Amendment 7, 12, 14, 16

No. 91-1583

In The

Supreme Court of the United States

October Term, 1991

DR. NOLAN L. KINSEY,

Petitioner,

v.

SALADO INDEPENDENT SCHOOL DISTRICT,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

To the Honorable Justices of The Supreme Court Of The United States:

Salado Independent School District, Respondent, files this Brief in Opposition to the Petition for Writ of Certiorari filed by the Petitioner, Dr. Nolan Kinsey, and would show as follows:

COUNTER STATEMENT OF THE CASE

A. Statement of the Facts

Petitioner's statement of the case is substantially correct so far as it goes, but does not mention important

features of Texas law bearing on the employment relationship between the board of trustees of an independent school district and its superintendent. The Petition also omits important matters of record bearing on the subject of Petitioner's speech and political position, his motive, and the disruptive effect of his electioneering on governance of the school district.

In Texas, the board of trustees of an independent school district is vested by statute with the "exclusive power to manage and govern the public schools." TEX. EDUC. CODE ANN. § 23.26(b) (Vernon 1987). The school board "may employ by contract a superintendent," *id.* § 23.28(a), who in turn acts as the "educational leader and administrative manager of the school district," *id.* § 13.351(a) (Vernon 1991). There is no Texas statute bestowing a property interest in the position of superintendent or limiting the management prerogatives of the board in respect to the superintendent.

Even so, the school board is a body corporate and can act only by majority vote at a duly-called meeting. It is totally dependent on the superintendent to interpret and effectuate its policies, directives, and decisions. It takes but a brief perusal of the hundreds of pages of technical regulations issued by the Texas Education Agency for the administration of public education, 19 TEX. ADMIN. CODE §§ 29-173 (West 1988 and 1992 Supp.) to appreciate that the superintendent, hired for his qualifications and expertise in interpreting and applying them, stands in a policymaking position in respect to his lay board of trustees, whose written policies, directives, and decisions cannot anticipate the myriad problems encountered in running the schools and whose ability to supervise is limited to

monthly board meetings and the occasional specially-called meeting.

The superintendent also stands in a confidential relationship to the board of trustees under Texas law. The superintendent is frequently required to advise the board of trustees in closed sessions in connection with real property transactions, prospective gifts and donations, personnel grievances and hearings, student discipline cases, security personnel or devices, consultation agreements with teachers, and receiving information from employees. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art 6252-17, § 2(f), (g), (h), (j), (m), and (r) (closed sessions authorized by Texas Open Meetings Act.) As the officer for public records of the district, TEX. REV. CIV. STAT. ANN. art. 6252-17a § 5(a) (Vernon Supp. 1992), the superintendent is the custodian of confidential documents such as personnel files, litigation files, sealed bids, prospective real or personal property acquisitions and associated appraisals and purchase price information, drafts and working papers involved in the preparation of proposed policies, interagency and intraagency memorandums, student records, home addresses and telephone numbers designated as private by officials and employees, and curriculum objectives and test items. *Id.* § 3(a)(2), (3), (4), (5), (6), (11), (14), (17) and (22) (information deemed confidential by Texas Open Records Act).

Nowhere in Texas law, however, is there any limitation upon the exclusive power of the board of trustees to manage and govern the public schools of the district.

Against this statutory setting, Petitioner's speech and political position in the school board election of 1988

consisted of his fundamental disagreement with a slate of candidates, who became the four-member majority elected to govern him, regarding the extent of authority the board was to exercise in managing and governing the school district. Petitioner and the incumbent "Berry slate" supported limiting the board's role strictly to the enactment of policy, leaving the operation of the school district to the school administrators. Fueled by widespread public dissatisfaction with Petitioner's administration of the district, the opposing "Hagler slate" supported a more active role for the board in running the schools. In the largest voter turnout in the history of the school district, the Hagler slate won the election by a wide majority.

The context of Petitioner's speech and political position does not show that he was speaking as a citizen, or that what he said was of public concern. Petitioner was plainly the focal point of the election. But the public's concern, and the reason the public wanted closer supervision over the superintendent, were the myriad problems of his superintendency, not what his position may have been regarding the board-superintendent relationship. Almost a year earlier, Petitioner had angered the community by proposing a weighted grading system seemingly calculated to give his daughter an advantage in becoming valedictorian. Since September 1987, he and the incumbent trustees he supported had resisted public disclosure of teachers' credentials, yet serious deficiencies in 44% of the district's teachers had come to light in a barrage of publicity just before the election. In January 1988, a bare majority of the board had voted to extend his contract, but only after two prolonged executive sessions devoted to problems with his performance. He knew that if the

Hagler slate were elected, he would have serious problems with his employment, and on cross-examination he admitted that his principal motive was to save his job. The district court, who was able to judge Petitioner's demeanor, found that his speech was only voiced in an attempt to protect his job. Petition For Writ of Certiorari, Appendix at 63.

Petitioner's electioneering was pervasively disruptive to governance of the school district after the election. Every action he took in regard to the new four-member majority showed that he still adhered to his political position and disavowed their authority over him. Petitioner selectively shut off board contact with his staff and rigidly controlled all information that went to the trustees except for his ally, trustee Jean Tarbutton. He insisted on a formal open records request before he would provide the new board president with his contract and the high school principal's contract. He communicated with the board, if at all, mostly through legal counsel. In interviewing new staff members, he was openly contemptuous of the board majority. Warring factions in the community attended each school board meeting by the hundreds, clamoring for or against Petitioner's termination. When the board majority attempted to work out directives with Petitioner in a last-ditch effort to work with him, he took immediate offense, assumed the board majority was just trying to document his eventual dismissal, and refused to participate in any meaningful way in the development and refinement of the directives. Less than a month before the start of school in August 1988, and with vacancies in every other administrative position in the district, he unilaterally went on vacation. When he returned, he

publicly disagreed with the directives, insisted on quarreling about them through his lawyer, and gave only token compliance, specifically violating two of them by failing to consult with the board president in putting items on the board agenda and allowing personal feelings to interfere with a teacher hiring decision. At trial in 1989, Petitioner testified that he was not only for the Berry slate but was openly against the platform and election of the Hagler slate, that he had never "backed up or backed away from those people" and that he was still of the opinion that he and the Berry slate were correct on the proper role of the school board. During the election, afterward up to the moment of his relief from duty, and as of the date of trial, Petitioner continued to insist on his belief and position that the board should have no active role in managing and governing the schools.

B. Course of Proceedings and Disposition in the Courts Below

The statement of the case in the Petition is substantially correct as to the course of proceedings and disposition in the courts below.

REASONS FOR DENYING THE WRIT

A. The Court of Appeals Correctly Determined That Petitioner was a Policymaker and Confidential Employee.

So far as Respondent has been able to discover, this is the only reported instance in which the chief executive

employee of a locally-elected governmental board has sought to invoke First Amendment protection for speech challenging the board's authority over him against the election of board members whose policies, directives, and decisions it is the essence of his position to interpret and implement. Judicial resolution of the constitutional issues involved would not appear to be frequent or beset with any difficulty in applying the guiding precedent from this Court. As pointed out in Judge Gee's dissent to the panel decision, it should go without saying that:

> " . . . The highest executive in a public school system [may not], by deliberately injecting himself into and making his policy views a central issue in a school board election, so entrench himself in office that he cannot be discharged even though the voters rejected both the views that he espoused and his surrogates, the candidates whom he sought to elect.
>
> " . . .
>
> "No lengthy writing is called for in dissent, it seems to me, for I do not think that this can be the law; to state the proposition is to refute it.
>
> " . . .
>
> "The relationship is all but symbiotic, and a ruder violation of it than public campaigning by the superintendent for one faction of the board against another can scarcely be imagined." Petition for Writ of Certiorari, Appendix at 56, 57, 60.

The guideposts established in the prior decisions of this Court are clear and, insofar as the balancing of Petitioner's interests in speech against Respondent's

interest in effective and efficient government is concerned, were correctly applied by the Court of Appeals. In determining whether a public employee's speech is protected by the First Amendment, there are two threshold issues of law: (1) whether the employee's speech was on a matter of public rather than private concern, *Connick v. Meyers,* 461 U.S. 138 (1983); and (2) whether the employee's interest in speech is outweighed by legitimate governmental interests of the employer. *Pickering v. Board of Education,* 391 U.S. 563 (1968). These threshold inquiries are purely questions of law, which the Court is to resolve independently upon its own assessment of the evidence. *Connick v. Meyers,* 461 U.S. 138, 148 n. 7, 150 n. 10 (1983). While the First Amendment generally protects public employees from discharge because of their political affiliation, holders of policy level or confidential positions are excluded from this protection where political affiliation is shown to be an appropriate requirement for the effective performance of the public office involved. *Branti v. Finkel,* 445 U.S. 507 (1980); *Elrod v. Burns,* 427 U.S. 347 (1976); *see, Rutan v. Republican Party of Illinois,* ___ U.S. ___, 110 S.Ct. 2729 (1990).

There is an insulting lack of substance and precision in the global argument at page 8 of the Petition that this Court has not addressed "the appropriate test to be used to evaluate a discharged public employee's claim of discharge for the exercise of protected rights of speech and association" or "the scope of the concept that certain public employees in certain positions may not enjoy First Amendment protection." Has Petitioner not read *Pickering, Elrod,* and *Branti*? Nowhere does Petitioner explain how those decisions leave unsettled the questions he

attempts to raise. Nowhere does Petitioner explain why the decision of the Court of Appeals in this case was not in accord with those cases.

Respondent submits that the decision of the Court of Appeals represents a straightforward application of the principles announced in *Pickering, Elrod,* and *Branti* under undisputed facts leaving no doubt that Petitioner was a policymaker and confidential employee whose loyalty to the management philosophy embodied in the electoral mandate to the new trustees was an appropriate requirement for effective performance of his position as the board's chief executive and administrative officer. The important question of federal law is whether the First Amendment shelters this loyalty in that position, and the prior decisions of this Court have already settled that question against Petitioner. Petitioner merely disagrees with a correct application of those principles to him by the Court of Appeals, which does not present either an unsettled question of federal law or a conflict with the applicable decisions of this Court.

Moreover, there is an independent ground upon which to sustain the decision of the Court of Appeals which, if review were granted, would preclude this Court from reaching the federal questions Petitioner attempts to raise. In *Connick v. Meyers,* 461 U.S. 138 (1983), this Court held that if a public employee's speech does not address a matter of public concern, as determined by its content, form, and context, it is unnecessary to scrutinize the reasons for the employee's discharge by balancing the employee's right to free speech against the employer's interest in efficient public service under *Pickering. Connick v. Meyers, supra,* 461 U.S. at 146-149. There is reason to

disagree with the Court of Appeals' determinations that Petitioner's conduct consisted of both "speech" and "association" and involved matters of public concern. Petition for Writ of Certiorari, Appendix at 8-9, 16. Although the Court of Appeals bases over thirteen pages of legal analysis on its conclusion that both "speech" and "association" were involved, the record shows and Petitioner concedes (Petition for Writ of Certiorari at 4) that Petitioner's only conduct was to engage in private conversations with Salado citizens and cause a letter complimentary to Berry's performance to be published in the local newspaper. There is no evidence of any non-speech political activity on his part.

Accordingly, whether or not Petitioner was speaking as a citizen on a matter of public concern would be a threshold issue for this Court to decide if review were granted. As detailed in the Counter Statement of the Case, *supra* at 4-5, there is ample evidence to support the district court's conclusion that Petitioner's speech was not on a matter of public concern but was only voiced out of private concern for the security of his job. There would be no reason to address the questions raised in the Petition, which relate to the *Pickering* balance.

B. No Substantial Conflict With Other Circuits Exists Regarding the "Policymaker/Confidential Employee" Exception.

In *Connick* this Court determined that the inquiry into the protected status of speech is one of law, not fact,

and nothing in the opinion or the authorities cited suggests that anything less than the entire *Pickering* balance is encompassed by that rule. *Connick v. Meyers,* 461 U.S. 138, 148 n. 7, 150 n. 10 (1983). Since the responsiveness of elected officials to voter mandates lies at the core of efficient and effective representative government in a democracy, the Court of Appeals is clearly correct in characterizing the "policymaker/confidential employee" exception of *Elrod/Branti* as an ingredient in the *Pickering* balance. Petition for Writ of Certiorari, Appendix 10-15; *McBee v. Jim Hogg County, Texas,* 730 F.2d 1009, 1014 (1984). It is likewise clear that whether a public employee is exempted from First Amendment protection as a "policymaker" or "confidential employee" is a question of law involving the independent constitutional judgment of the Court.

The cases in other circuits cited by Petitioner at page 9 of the Petition do not present any significant conflict with this principle. It is true that in each case the question of whether a public employee fell within the "policymaker/confidential employee" exception was required to be submitted to a jury. However, it should be noted that *McCollum v. Stahl,* 579 F.2d 869 (4th Cir. 1978) and *Nekolny v. Painter,* 653 F.2d 1164 (7th Cir. 1981) predate *Connick,* and that no authority was advanced to the Court in *Soderbeck v. Burnett County, Wis.,* 752 F.2d 285 (7th Cir. 1985), in support of defendant's argument that whether or not an employee exercises a policymaking role or is a repository of confidences that make loyalty an essential part of his job description should always be a question of law. *Id.* at 288-289. Recent decisions in the Seventh Circuit decide these issues as a matter of law at the appellate

level, with only lip service paid to the role of the fact-finder. *See, e.g., Upton v. Thompson*, 930 F.2d 1209, 1218 (7th Cir. 1991) (dissenting opinion); *Hudson v. Burke*, 913 F.2d 427 (7th Cir. 1990). In light of this Court's clear guidance in *Connick*, it is very likely that future decisions in the Fourth and Seventh Circuits will hold that the "policymaker/confidential employee" exception presents a question of law.

Moreover, the judgment notwithstanding the verdict entered by the district court and affirmed by the Court of Appeals should be sustained on the independent ground that no issue of controverted fact upon which reasonable minds could differ existed as to Petitioner's position as a "policymaker" and "confidential employee." The nature of a Texas school superintendent's position is so indisputable under the evidence in this case and as a matter of Texas law that the judgment notwithstanding the verdict would have been proper even if the issue were regarded as one of fact. Accordingly, the asserted conflict with decisions in the Fourth and Seventh Circuit is moot and would not be reached in the event this Court granted review.

C. No Conflict Exists Regarding Availability of the *Pickering* Defense.

Petitioner's final point appears to be that the employer in a First Amendment employment case must forego a defense under *Pickering* if it denies that the employee's speech motivated its decision to terminate the employee. The idea, it seems, is that Petitioner's speech and political position were unknown to the trustees in the

present case and perforce could not have been disruptive to the employment relationship.

Petitioner thus disagrees with jury findings entered in his favor pursuant to *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). The jury in this case found that Petitioner's speech was a substantial motivating factor in the decision to relieve him with pay and that the decision would not have occurred in the absence of his speech. But if, as Petitioner now asserts, the trustees did not know of his speech or political position, then that was obviously not a substantial motivating factor, and their decision would have been the same had it not occurred. Petitioner cannot have his cake and eat it too.

But more fundamentally, it is immaterial to the *Pickering* balance whether or not the trustees who voted to relieve Petitioner with pay knew of his speech or political position. Certainly one element of the *Pickering* balance is whether the employee's speech is actually or potentially disruptive to the employment relationship. But it is a misstatement of the law for Petitioner to argue that actual disruption is absolutely required. In *Connick*, the employee's dismissal was upheld because the questionnaire constituting her speech carried the clear potential for undermining office relations. *Connick v. Meyers*, 461 U.S. 138, 152 (1983). As a matter of reason, logic, and common sense, an employee's speech or political position need not be known to the employer to be potentially or actually disruptive of the employment relationship. In the present case, Petitioner's speech and political position were fatal to the employment relationship whether the trustees knew of it or not, as evidenced by the discord in the community and between Petitioner and the board

majority after the election. The Court of Appeals properly took account of these factors in striking the *Pickering* balance in favor of the employer. Petition for Writ of Certiorari, Appendix at 18-19.

Nothing to the contrary is contained in the cases from the Tenth Circuit cited by Petitioner, which are distinguishable in both fact and principle. In *Copp v. Unified School Dist. No. 501*, 882 F.2d 1547 (10th Cir. 1989), a high school custodian opposed transfer of his principal to another school, whereupon the school board transferred him to a less responsible and more physically arduous job. In reversing a judgment notwithstanding the verdict for the employer on *Connick/Mt. Healthy* grounds, the Tenth Circuit observed in dictum that defendant presented no evidence that plaintiff's speech had any deleterious effect on discipline, working relationships, plaintiff's performance, or regular operations of school. *Id.* at 1552. In *Ware v. Unified School Dist. No. 492*, 881 F.2d 906 (10th Cir. 1989), a secretary claimed the superintendent had discharged her in retaliation for her disapproval of a proposal in a bond issue. There likewise, the employer did not assert or support with evidence the existence of a confidential employment relationship, disruptive effect, or any other ingredient of a *Pickering* defense. *Id.* at 910. In *Rankin v. Independent School District No. I-3*, 876 F.2d 838 (10th Cir. 1989), a tenured teacher who spoke with parents and at school board meetings against corporal punishment suffered a directed verdict that his speech was not protected by the First Amendment. The disputed issue was whether the teacher spoke on a matter of public concern, which the Tenth Circuit resolved in favor of the teacher. In dictum relegated to a

footnote, the court observed without analysis that the *Pickering* balance was not at issue since the defendants did not claim the speech was disruptive but rather played no part in their decision. *Id.* at 842-844, n. 8. *Saye v. St. Vrain Valley School Dist. RE1J*, 785 F.2d 862 (10th Cir. 1986) involved nonrenewal of a special education teacher who claimed retaliation for activities as faculty representative of a union. Again, the employer did not argue that its interest in efficient and effective government supported the decision to terminate the employee, but limited its defense to the *Mt. Healthy* causation issues. *Id.* at 867.

These decisions do not present any conflict in principle with the decision below. In each case, the employer simply failed to raise a *Pickering* defense, which the Tenth Circuit resolved on the principle that a party is not entitled to prevail on issues of fact or law not raised or supported with evidence.

In the present case, Respondent raised the *Pickering* defense on motion for summary judgment prior to trial, on motions for directed verdict at trial, and on motion for judgment notwithstanding the verdict after trial. At every stage, Respondent supported its *Pickering* defense with comprehensive evidence of the nature of Petitioner's position and employment relationship with the board of trustees, the political platform upon which each candidate on the Hagler slate ran for election, controversy over Petitioner's superintendency prior to and during the election campaign, and the destruction of the working relationship between Petitioner and Respondent after the election with consequent disruption of the governmental processes of the school district. Unlike the Tenth Circuit cases cited by Petitioner, the Court of Appeals here was

squarely confronted with a *Pickering* defense properly raised and amply supported by evidence, which it correctly resolved in Respondent's favor.

The alleged conflict in circuits is illusory. The only conflict of authority is between the Petitioner's position and the precedents of this Court.

CONCLUSION AND PRAYER

Petitioner has failed to satisfy the requirements for review on certiorari and no extraordinary reason exists for the granting of the Writ by this Court. The decision below is correct and consistent with this Court's jurisprudence. The decision of the Court of Appeals does not pose any significant conflict with the decisions of courts of appeals in other circuits. The Court of Appeals correctly held that Petitioner's speech and association were not protected by the First Amendment, and there is no reason to review that decision. Accordingly, Respondent respectfully submits that the Petition for Writ of Certiorari must be denied.

Respectfully submitted,

William C. Bednar, Jr.
Eskew, Muir & Bednar
2050 Bank One Tower
221 West 6th Street
Austin, Texas 78701
(512) 477-6175
(512) 477-6617